TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~237~~ 31.

INTERNATIONAL TRUST COMPANY, PLAINTIFF IN ERROR,

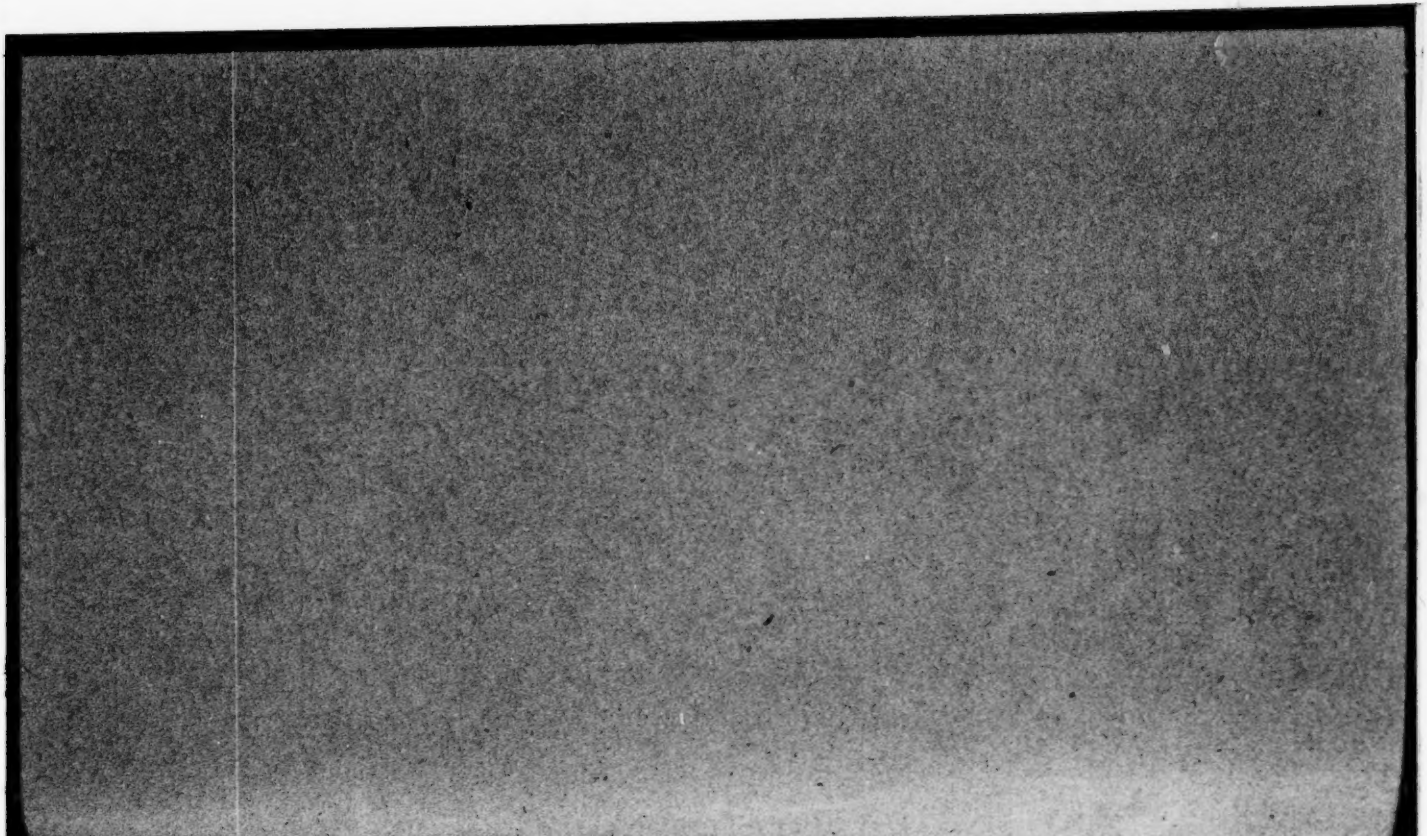
vs.

JOHN W. WEEKS, AGENT OF THE SHAREHOLDERS OF THE BROADWAY NATIONAL BANK.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

FILED MAY 31, 1905.

(19,784.)



(19,784.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905.

No. 282.

INTERNATIONAL TRUST COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN W. WEEKS, AGENT OF THE SHAREHOLDERS OF THE BROADWAY NATIONAL BANK.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

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a United States Circuit Court of Appeals for the First Circuit, October Term, 1904.

No. 572.

INTERNATIONAL TRUST COMPANY, Plaintiff, Plaintiff in Error,
v.
JOHN W. WEEKS, Agent, Defendant, Defendant in Error.

Error to the Circuit Court of the United States for the District of Massachusetts. Judgment in Circuit Court (Putnam, J.), January 25, 1905.

Writ of Error to United States Circuit Court of Appeals for the First Circuit and Return Thereon of said United States Circuit Court of Appeals.

1 UNITED STATES OF AMERICA, *ss:*

[Seal United States Circuit Court of Appeals, First Circuit.]

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between International Trust Company, plaintiff in error, and John W. Weeks, Agent of the shareholders of the Broadway National Bank, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the twenty fourth day of May, in the year of our Lord one thousand nine hundred and five.

JOHN G. STETSON,
Clerk of the United States Circuit Court of Appeals for the First Judicial Circuit.

Allowed by—
LE BARON B. COLT,
Senior Circuit Judge, First Judicial Circuit.

1a *Return of United States Circuit of Appeals for the First Circuit on Writ of Error.*

United States Circuit of Appeals for the First Circuit.

And now, here the Judges of the United States Circuit Court of Appeals for the First Circuit make return of this writ by annexing hereto and sending herewith a true copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I, John G. Stetson, Clerk of said United States Circuit Court of Appeals for the First Circuit, hereto set my hand and affix the seal of said court at Boston, in the First Judicial Circuit, this twenty-ninth day of May, A. D. 1905.

[Seal United States Circuit Court of Appeals, First Circuit.]

JOHN G. STETSON, *Clerk.*

2 *Transcript of Record and all Proceedings in United States Circuit Court of Appeals for the First Circuit.*

United States Circuit Court of Appeals for the First Circuit, October Term, 1904.

No. 572.

INTERNATIONAL TRUST COMPANY, Plaintiff, Plaintiff in Error,
v.
JOHN W. WEEKS, Agent, Defendant, Defendant in Error.

Writ of Error.

[L. S.] UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the District of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you or some of you, between the International Trust Company, a corporation duly established under the laws of the Commonwealth of Massachusetts, and having its usual place of business in Boston, in the District of Massachusetts, plaintiff, and John W. Weeks, of Boston, in the District of Massachusetts, agent of the shareholders of the Broadway National Bank, a banking association established under the laws of the United States, defendant, a manifest error hath happened, to the great damage of the said [illegible] as by [illegible] complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the

parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things
2a concerning the same, to the United States Circuit Court of Appeals for the First Circuit, together with this writ, so that you have the same at the city of Boston, Massachusetts, on the twenty-eighth day of February next, in the said Circuit Court of Appeals; that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the thirty-first day of January, in the year of our Lord one thousand nine hundred and five.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
W. L. PUTNAM,
U. S. Circuit Court Judge.

January 31, 1905.

Return of Circuit Court on Writ of Error.

CIRCUIT COURT OF THE UNITED STATES,
District of Massachusetts, ss:

And now, here, the judges of the Circuit Court of the United States, in and for the District of Massachusetts, make return of this writ by annexing hereto and sending herewith, under the seal of the said Circuit Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the United States Circuit Court of Appeals for the First Circuit, as within commanded.

In testimony whereof, I, Alexander H. Trowbridge, Clerk of said Circuit Court of the United States, in and for the District of Massachusetts, have hereto set my hand and the seal of said court this twentieth day of March, A. D. 1905.

[SEAL.] ALEX. H. TROWBRIDGE, *Clerk.*

3 *Transcript of Record of Circuit Court.*

(Filed in Circuit Court of Appeals February 2, 1905.)

Circuit Court of United States, District of Massachusetts.

At a Circuit Court of the United States for the First Circuit, begun and holden at Boston, within and for the District of Massachusetts, on the third Tuesday of October, being the eighteenth day of October, in the year of our Lord one thousand nine hundred and four, before the Honorable Francis C. Lowell, U. S. District Judge.

No. 1173*a*, Law Docket.

INTERNATIONAL TRUST COMPANY, Plaintiff,
v.
JOHN W. WEEKS, Agent, Defendant.

The Mandate of the United States Court of Appeals for the First Circuit, in this cause, was received and filed in the clerk's office at the February Term of this Court, A. D. 1904, and is in the words and figures following:—

Mandate.

(Filed in Circuit Court, May 3, 1904.)

UNITED STATES OF AMERICA, *ss:*

[L. S.] The President of the United States of America to the Honorable the Judges of the Circuit Court of the United States for the District of Massachusetts, Greeting:

Whereas, lately in the Circuit Court of the United States for the District of Massachusetts, before you, or some of you, in a cause between the International Trust Company, plaintiff, and John W. Weeks, agent, defendant, the following judgment was entered on the thirteenth day of January, 1903:—

Judgment.

January 13, 1903.

It is thereupon considered by the Court, to wit, January 13, 1903, the Honorable William L. Putnam, Circuit Judge, sitting, that the said International Trust Company, plaintiff, recover of the said John W. Weeks, agent, defendant, the sum of five thousand one hundred and twenty-three dollars and sixty-six cents ($5123.66) damages, and its costs of suit taxed at.....

4 as by the inspection of the transcript of the record in said cause of the said Circuit Court, which was brought into the United States Circuit Court of Appeals for the First Circuit, by virtue of a writ of error, sued out by the said John W. Weeks, agent, agreeably to the Act of Congress, in such cases made and provided, fully and at large appears; and whereas, in the term of October, in the year of our Lord one thousand nine hundred and two, the said cause came on to be heard before the said Circuit Court of Appeals, on the said transcript of record, and was argued by counsel, and was thence continued to the present term of October, in the year of our Lord one thousand nine hundred and three:

On consideration whereof, it is now, to wit, October 6, 1903, here ordered, adjudged and decreed as follows: The judgment of the Circuit Court is reversed; the verdict is set aside; the case is remanded

to that court for further proceedings in accordance with the opinion passed down this day; and the costs of appeal are awarded to the plaintiff in error.

Costs in this United States Circuit Court of Appeals for which execution is to issue from said Circuit Court in favor of the said John W. Weeks, agent, plaintiff in error, and against the said International Trust Company, defendant in error, are taxed at one hundred and twenty-four dollars and forty-eight cents ($124.48).

A copy of the opinion of the United States Circuit Court of Appeals accompanies this mandate.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the aforesaid judgment of this Court as according to right and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the third day of May, in the year of our Lord one thousand nine hundred and four.

JOHN G. STETSON,
Clerk of the United States Circuit Court of Appeals for the First Circuit.

Costs of Plaintiff in Error.

Clerk, including Mandate	$39.85
Printing Record	64.63
Attorney	20.00
	$124.48

This cause was thence continued to the present October Term, A. D. 1904, when issue is joined upon the pleadings, namely, Writ, Declaration, Answer, Motions to Amend Answer and Demurrer to Amendment to Answer.

5 *Writ.*

(Entered October 15, 1901.)

[L. S.] MASSACHUSETTS DISTRICT, *ss:*

The President of the United States of America to the Marshal of our District of Massachusetts, or his Deputy, Greeting:

We command you to attach the goods or estate of John W. Weeks, of Boston, in said District, as he is agent of the shareholders of the Broadway National Bank, a banking association established under the laws of the United States, in our District of Massachusetts, to the value of ten thousand dollars, and to summon said Weeks (if he may be found in your District) to appear before our judges of our Circuit Court of said United States for the First Circuit, next to be holden at Boston, within and for our said District of Massachusetts,

on the fifteenth day of October next; then and there in our said court to answer unto the International Trust Company, a corporation duly established under the laws of the Commonwealth of Massachusetts and having its usual place of business in said Boston.

In an action of contract.

To the damage of the said plaintiff, as it says, the sum of ten thousand dollars, which shall then and there be made to appear, with other due damages. And have you there this writ, with your doings therein.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at Boston, the twenty-first day of June, in the year of our Lord one thousand nine hundred and one.

L. C. TUCKER,
Deputy Clerk.

BOSTON, *June* 21, 1901.

UNITED STATES OF AMERICA,
Massachusetts District, ss:

Service of the within writ is hereby accepted.

CARVER & BLODGETT,
Attorneys for John W. Weeks, as He is Shareholders' Agent of the Broadway National Bank.

6 *Declaration.*

(Filed October 15, 1901.)

And the plaintiff says that on the twenty-eighth day of March, 1899, it became the owner of certain premises situated in Boston, in the county of Suffolk and Commonwealth of Massachusetts, on the southerly side of Milk Street, at the corner of Arch Street, said premises being bounded northerly by Milk Street, easterly by other premises of the plaintiff, occupied by the building of the International Trust Company, southerly by land of James T. Phelps and westerly by Arch Street, containing about 4256 square feet more or less, having received conveyance thereof from John M. Graham, dated March 28, 1899, and recorded with Suffolk Deeds, liber 2595, folio 279; that the Broadway National Bank had leased from Henry Parkman and others, previous owners of said premises hereinbefore described as belonging to the plaintiff, a portion thereof, to wit, the banking rooms on the first floor of said building, with the basement under the same, to be used as the business offices of said corporation and for no other purpose, as more fully appears by the lease, copy whereof is hereto annexed marked "Exhibit A," said lease having been made August 11, 1898, for the term of ten years from April 1, 1899, at the rent of six thousand (6000) dollars yearly and that after the plaintiff became the owner of said premises and until the breach of condition hereinafter set forth, the Broadway National Bank paid rent to the plaintiff and in other respects per-

formed the covenants and conditions of said lease; that said lease contained the following clause:

"Provided always, and these presents are upon this condition, that if the said lessee or its successors or assigns do or shall neglect or fail to perform and observe any or either of the covenants contained in this instrument, which on its or their part are to be performed, or if the said lessee shall be declared bankrupt or insolvent according to law, or if any assignment shall be made of its property for the benefit of creditors, then and in either of the said cases, the lessors, or those having their estate in the said premises, lawfully may, immediately or at any time thereafter and whilst such neglect or default continues and without further notice or demand,
7 enter into and upon the said premises, or any part thereof, in the name of the whole, and repossess the same as of their former estate and expel the said lessee and those claiming under it, and remove its effects (forcibly, if necessary), without being taken or deemed guilty of any manner of trespass and without prejudice to any remedies which might otherwise be used for arrears of rent, or preceding breach of covenant; and thereupon the lessors may, at their discretion, relet the premises, at the risk of the lessee, who shall remain for the residue of said term responsible for the rent herein reserved, and shall be credited with such amounts only as shall be by the lessors actually realized."

That on the sixteenth day of December, 1899, the Broadway National Bank became and was insolvent and was declared insolvent by the comptroller of the currency being thereto duly authorized by law; that Daniel G. Wing was duly appointed receiver of said bank and took possession of said bank and of its assets in accordance with law; that on January 5, 1900, the plaintiff entered upon and took possession of the premises leased to said bank for breach of the condition of said lease, to wit, the condition providing that if the lessee should be declared bankrupt or insolvent according to law, the lessors, or those having their estate in the premises, might enter and expel therefrom said bank as lessee, and that the plaintiff has since been in possession of said premises by virtue of such entry and taking possession; that by the terms of said lease said bank, notwithstanding such entry and taking possession by the plaintiff, remained and remains responsible for the rent reserved by said lease; that the rent due on the last days of May, 1900, June, 1900, July, 1900, August, 1900, September, 1900, October, 1900, November, 1900, December, 1900, January, 1901, February, 1901, March, 1901, April, 1901, and May, 1901, was unpaid; that demand for said rent was duly made of said bank when said amounts were severally due and that the total amount of rent due and unpaid May 31, 1901, was sixty-five hundred (6500) dollars, for which said bank is responsible; that on January 22, 1900, John W. Weeks was duly elected agent, in accordance with the provisions of Chapter 156 of the statutes of the United States for the year 1876, and that on February 15, 1900, the comptroller of the currency and Daniel
8 G. Wing, receiver as aforesaid, duly transferred and delivered to said Weeks, as agent of the Broadway National Bank, all

the assets and property of said bank, and that by virtue of the appointment of said Weeks as agent and of the other acts aforesaid, he became and is liable to be sued in his own name for the rent hereinbefore set forth.

Wherefore, the plaintiff alleges that the defendant is indebted to the plaintiff in the sum of sixty-five hundred (6500) dollars for the several amounts of rent hereinbefore stated.

By its Attorney, ROBERT M. MORSE.

EXHIBIT A.

This Indenture, made this eleventh day of August, in the year eighteen hundred and ninety-eight, by and between Henry Parkman, J. Elliot Cabot and William W. Vaughan, trustees under the will of Mary H. Dwight; Henry Parkman and J. Elliot Cabot, trustees under the will of Anna C. L. Mills; Henry Parkman and William Nichols, trustees under the will of Sophia D. Wells; Thornton K. Lothrop, trustee under the will of Mary E. Parkman; Henry Parkman and Thomas L. Livermore, trustees under the will of John Walter Wells and Henry Parkman, lessors, and the Broadway National Bank, a corporation organized under the laws of the United States, lessee,

Witnesseth: That the said lessors do hereby lease unto the said lessee the following premises in the building, situated 39 Milk Street, in Boston, in the county of Suffolk and Commonwealth of Massachusetts, viz.: The premises now occupied by said bank, namely, the banking rooms on the first floor of said building and the basement under the same, with the privileges and appurtenances to the same belonging, to be used as the business offices of said corporation and for no other purpose.

To have and to hold the said leased premises unto the said lessee and its successors for the term of ten (10) years from the first day of April, eighteen hundred and ninety-nine.

Yielding and paying (except only in case of fire or other casualty as hereinafter is mentioned) the sum of six thousand (6000)
9 dollars yearly, by equal monthly payments of five hundred (500) dollars each, on the last day of each month during the said term, and at that rate for such further time as the said lessee, or any other person or persons claiming under it, shall hold the said premises, or any part thereof; the first payment thereof to be made on the last day of April now next ensuing.

And the said lessee for itself and its successors hereby covenants with the said lessors, their representatives and assigns, that it or they will, during the said term, and for such further time as the said lessee or any other person or persons claiming under it shall hold the said premises, or any part thereof, pay unto the lessors, their representatives or assigns, the said rent upon the days hereinbefore appointed for the payment thereof (except only in case of fire or other casualty as hereinafter mentioned); and also will keep all and singular the said premises in such repair as the same are in at the

commencement of said term, or may be put in by the said lessors or their representatives or assigns during the continuance thereof, reasonable use and wearing thereof, and damage by accidental fire or inevitable accidents only, excepted; that it or others having its estate in the premises will not assign this lease, nor underlet the whole or any part of the said premises, without permission in writing being first given by the lessors, nor make nor allow to be made any unlawful, improper or offensive use thereof; and further, that it will indemnify and save harmless the lessors, and those having their estate in the premises, from all loss or damage occasioned by negligent use, misuse or abuse in said building, of water, water fixtures, steam-heating apparatus, gas or gas fixtures, by the said lessee or by those having its estate in the premises, or by any person or persons claiming under them; and that no alterations or additions shall be made, during the term aforesaid, in or to the same, without the consent of the said lessors or those having their estate in the premises being first obtained in wrting, allowing thereof. And also that the said lessee and its successors will, at the end or other termination of said term, peaceably yield up unto the said lessors, or those having their estate therein, the leased premises, and all additions and improvements that may be made thereto, in as good order and condition, reasonable use and wear thereof and damage by fire or other casualties excepted, as the same now are in, or may be put into; that the lessee will not suffer any strip or waste of the premises, and will not drill or make any hole in the stone or brick work, and will not drive nails, staples or screws into the plaster or woodwork; and also that the said leased premises, or any part thereof, shall not be occupied or used by the lessee, or those holding under it, for any other purpose or business than that for which the same are hereby leased, and which is expressed in this lease, without permission in writing first given by the lessors; and also that the lessee, or those holding under it, will not do or suffer any act which will increase the rate of insurance on said building or on property therein, or cause extra insurance to be required thereon, or invalidate any insurance thereon, or cause extra risk of fire in said building.

Provided, always, and these presents are upon this condition, that if the said lessee or its successors or assigns do or shall neglect or fail to perform and observe any or either of the covenants contained in this instrument, which on its or their part are to be performed, or if the said lessee shall be declared bankrupt or insolvent according to law, or if any assignment shall be made of its property for the benefit of creditors, then and in either of the said cases the lessors, or those having their estate in the said premises, lawfully may, immediately or at any time thereafter, and whilst such neglect or default continues, and without further notice or demand, enter into and upon the said premises or any part thereof, in the name of the whole, and repossess the same as of their former estate, and expel the said lessee and those claiming under it, and remove its effects (forcibly, if necessary), without being taken or deemed guilty of any manner of trespass, and without prejudice to any remedies

which might otherwise be used for arrears of rent or preceding breach of covenant; and thereupon the lessors may, at their discretion, relet the premises, at the risk of the lessee, who shall remain for the residue of said term responsible for the rent herein reserved and shall be credited with such amounts only as shall be by the lessors actually realized. Also, that in case the premises or any part thereof, or any part of the building of which they form a part, shall, during said term, be destroyed or damaged by fire or other unavoid-
11 able casualty, so that the same shall be thereby rendered unfit for use and occupation, or shall be taken for a street or any public use, in such case the rent hereinbefore reserved, or a just and proportionate part thereof, according to the nature and extent of the injury sustained, shall be suspended or abated until the said premises shall have been put in proper condition for use and occupation by the said lessors; or these presents shall thereby be determined and ended, at the election of the said lessors or their representatives or assigns, without right or claim of the lessee or its successors for damage by reason of such taking or termination.

In case of the eviction of the lessee, or in case of the termination of this lease, by reason of fire or other cause, the lessors may immediately recover of the lessee the pro rata rent up to the time of such eviction or termination, irrespective of the periods herein prescribed for the payment of rent.

The lessee agrees to pay, as they become due and payable, all bills for gas consumed on the premises hereby leased, and to reimburse the lessors, on demand, for any and all sums of money which the lessors may pay for gas conssumed on said leased premises during the term of this lease. The lessee shall not be liable for any extra charge for steam heat.

It is hereby expressly agreed that all merchandise, furniture and property of every kind, which may be on the premises during the continuance of this lease, are to be at the sole risk and hazard of the lessee, and that if the whole or any part thereof shall be destroyed or damaged by fire, water or otherwise, or by the use or abuse of water, or by the leakage or bursting of water pipes, in any part of the building, or in any other way or manner, or from any other cause whatsoever, no part of said loss or damage is to be charged to or borne by the lessors in any case whatever; and also that the lessee will replace any glass broken or injured in said leased premises while it shall hold the same, with glass of the same quality as that which may be broken; and also keep in repair all water and other fixtures, and leave the same at the end of the term in perfect condition; and that the lessors shall not be called upon or required to make any improvements, alterations, or repairs on the premises.

The lessors will cause the elevator in said building to be
12 operated daily during such reasonable business hours as may be designated by them, except on Sundays and such days as may be generally observed as holidays, and except when the same shall be stopped by accident or for repairs; but they assume no liability for any injury to person or property which may result from the operation of said elevator, and the lessee covenants to make no

claim at any time against the lessors or their representatives for damages for such injury.

And the said lessors covenant and agree with the said lessee and its successors, that it or they, paying the rent aforesaid, and performing the covenants herein contained, on its or their part to be paid and performed, shall peaceably hold and enjoy the said demised premises, without hindrance or interruption by the said lessors or any persons claiming under them.

In witness whereof, the said lessors have hereunto set their hands and common seal, and the said lessee has caused these presents to be executed in its name and behalf by Roswell C. Downer, its president, thereto duly authorized, and its corporate seal hereto affixed, the United States revenue stamp, as required by law, having been duly affixed and cancelled, all on the day and year first above written.

[SEAL.] BROADWAY NATIONAL BANK,
By ROSWELL C. DOWNER, *President.*
HENRY PARKMAN, [SEAL.]
J. ELLIOT CABOT,
W. W. VAUGHAN,
Trustees under Will of Mary H. Dwight.
HENRY PARKMAN,
J. ELLIOT CABOT,
Trustees under Will of Anna C. L. Mills.
HENRY PARKMAN,
WILLIAM NICHOLS,
Trustees under Will of Sophia D. Wells.
HENRY PARKMAN,
THOMAS L. LIVERMORE,
Trustees under Will of John W. Wells.
THORNTON K. LOTHROP,
Trustee under Will of Mary E. Parkman.
HENRY PARKMAN.

13 *Answer.*

(Filed November 18, 1901.)

And now comes the defendant in the above-entitled cause and for answer denies each and every item and allegation in the plaintiff's writ and declaration contained.

And further answering the defendant says that if he ever owed the plaintiff anything he has paid the same in full and now owes the plaintiff nothing.

By His Attorneys, CARVER & BLODGETT.

Motion to Amend Answer.

(Filed by Consent, June 10, 1902.)

And now comes the defendant in the above-entitled cause and moves to amend his answer filed therein by adding thereto the following, to wit:

And further answering the defendants says that upon terminating the lease as set forth in the plaintiff's declaration, it became the plaintiff's duty to use all reasonable efforts to relet the premises described in the said lease so as to minimize the damages, if any, which the defendant might be or become liable to pay to the plaintiff by reason of the clause in said lease, authorizing the lessors at their discretion to relet the premises at the risk of the lessee, and stipulating that the lessee should remain for the residue of the term of the lease responsible for the rent therein reserved, or the damages which the defendant might be or become liable to pay to the plaintiff for any other reason on account of said lease; that the plaintiff has not used reasonable efforts as aforesaid and has not used any efforts to relet the premises so as to minimize the damage if any, which the defendant may be or become liable to pay the plaintiff as aforesaid, but on the contrary, although suitable and responsible parties have been ready and willing at various times to take a lease of the premises in question from the plaintiff at a rent as great as or greater than the rent reserved in the lease to the Broadway Bank, the plaintiff has wholly and arbitrarily refused to accept such parties as tenants.

14 And further answering the defendant says that suitable and responsible parties were ready and willing and actually offered to take a lease of the said premises from the plaintiff at a rent greater than or as great as that reserved in the lease, and such parties were so ready and willing and made such offers at such times and in such manner that if said parties or any of them had been accepted as tenants by the plaintiff, the plaintiff would have received rent for the said premises during the whole of the period for which rent is claimed in the plaintiff's declaration, and that the amount of rent which the plaintiff would so have received would have been as great as or greater than the rent reserved in the lease; that nevertheless the plaintiff wholly and arbitrarily refused to accept said parties or any of them as tenants of the premises aforesaid.

Wherefore the defendant says that if he in any case would be held liable to pay the plaintiff anything by reason of the lease in the plaintiff's declaration set forth, he is not, under the circumstances above set forth, liable to pay the plaintiff anything, the plaintiff not having used reasonable effort to relet the premises and minimize the damage, if any, which the defendant might be or become liable to pay to the plaintiff as aforesaid.

By His Attorneys, CARVER & BLODGETT.

Demurrer to Amendment to Answer.

(Filed June 10, 1902.)

And now comes the plaintiff and demurs to the defendant's amendment to his answer, and for cause of demurrer says that the amendment to the answer does not state a legal defense to the declaration and that the matters or things relied upon therein are not sufficient in law to constitute a legal defence to said declaration.

By its Attorney, ROBERT M. MORSE.

I, Robert M. Morse, attorney for the plaintiff in the above-entitled cause, hereby certify that I am of opinion that there is such probable ground in law for this demurrer as to make it a fit subject for judicial inquiry and trial, and that it is not intended merely for delay.

ROBERT M. MORSE.

15 *Motion to Amend Answer.*

(Filed and Allowed by Consent, September 17, 1902.)

And now comes the defendant in the above-entitled cause and moves to amend his answer therein as already amended, so that the same shall read as follows:

And now comes the defendant in the above-entitled cause and for answer denies each and every item and allegation in the plaintiff's writ and declaration contained.

And further answering the defendant says that if he ever owed the plaintiff anything, he has paid the same in full, and now owes the plaintiff nothing.

And further answering the defendant says that upon terminating the lease as set forth in the plaintiff's declaration, it became the plaintiff's duty to use all reasonable efforts to relet the premises described in said lease so as to minimize the damages, if any, which the defendant may be or become liable to pay to the plaintiff by reason of said lease or any clause contained therein, and especially by reason of a clause in said lease authorizing the lessors at their discretion to relet the premises at the risk of the lessee, and stipulating that the lessee should remain for the residue of the term of the lease responsible for the rent therein reserved; that if the plaintiff had used reasonable efforts as aforesaid to relet the premises, either personally or through brokers, suitable and responsible parties could and would have been found who would have been ready and willing to become tenants of the premises aforesaid, either as tenants at will or under a written lease, and who would have agreed that the premises should be used as the business offices of said tenants and for no other purpose; that nevertheless the plaintiff has not used reasonable efforts as aforesaid, and has not used any efforts to relet the premises so as to minimize the damage, if any, which the defendant may be or become liable to pay to the plaintiff as aforesaid;

that on the contrary, although suitable and responsible parties have been ready and willing, and, directly, and through real estate brokers and otherwise, have offered at various times to become tenants of the premises in question, either as tenants at will or under a written lease, at a rent as great as or greater than the rent reserved in
16 the lease to the Broadway Bank, and to agree that the premises should be used for the business offices of said tenants and for no other purpose, the plaintiff has wholly and arbitrarily refused to accept such parties as tenants in any way, shape or manner.

And further answering the defendant says that suitable and responsible parties were ready and willing and actually offered to take a lease of the said premises from the plaintiff at a rent greater than or as great as that reserved in the lease, and to agree that the premises should be used for the business offices of such parties and for no other purpose, and such parties were so ready and willing and made such offers at such times and in such manner that if said parties or any of them had been accepted as tenants by the plaintiff the plaintiff would have received rent for the said premises during the whole of the period for which rent was claimed in the plaintiff's declaration; that the amount of rent the plaintiff would so have received would have been as great as or greater than the rent reserved in the lease; that nevertheless the plaintiff wholly and arbitrarily refused to accept said parties or any of them as tenants of the premises aforesaid.

And further answering the defendant says that when the said lease was terminated by the plaintiff as set forth in the declaration, the basement of the premises leased to the Broadway Bank had been theretofore sublet by it and was then occupied by the sub-tenants of the said bank at a rental of one hundred (100) dollars per month; that when the said lease of the Broadway Bank was terminated as aforesaid, the plaintiff accepted the said sub-tenants as its tenants at the rental aforesaid and collected said rent from them and credited the defendant with the rents so collected from the termination of the said lease as aforesaid to a period subsequent to the time when the last of the offers hereinafter referred to was made, and the said tenants so accepted by the plaintiff remained in occupation and continued to pay rent as aforesaid during all the said time from the termination of said lease to a period subsequent to the last of the said offers hereinafter mentioned; that on or about April 30, 1900, the defendant, by his attorney, Edward E. Blodgett, offered to the plaintiff as a tenant for all the premises leased to the Broadway Bank as in the declaration set forth, except the basement, the Beacon
17 Trust Company, a corporation organized under the laws of Massachusetts and doing business in the city of Boston, in said State, for the balance of the term of the lease under a form of lease identical with that of the lease to the said Broadway Bank; that on or about September 21, 1900, the defendant, through his agents and brokers, Whitcomb & Wead, again offered to the plaintiff the said Beacon Trust Company as a tenant for said premises, exclusive of the basement, upon the said terms; that the said Beacon Trust Company was during the whole of the year 1900, has been since, and

is now, in every way a suitable and responsible party as a tenant, and was, when said offers were made, ready and willing and offered the plaintiff to take a lease of the premises as aforesaid, to be used as the business offices of said corporation and for no other purpose; that on or about November 9, 1900, the defendant offered to the plaintiff as a tenant for all the premises leased to the Broadway Bank, except the basement, under a lease identical in terms with the lease to the Broadway Bank, the Massachusetts Title Insurance Company, a corporation organized under the laws of Massachusetts, and doing business in the city of Boston, in said State, at a rental of four thousand five hundred (4500) dollars a year for the balance of the term; that the, said Massachusetts Title Insurance Company was during the whole of the year 1900, has been since, and is now, a suitable and responsible party as a tenant, and was ready and willing and offered the plaintiff, at the time said offer was made, to take a lease of the premises to be used as the business offices of said corporation, and for no other purpose; and that various other persons and corporations, in every way suitable and responsible, whose names are unknown to defendant, at various times since the termination of the lease by the plaintiff as aforesaid, offered the plaintiff directly, through real estate brokers and otherwise, to take a lease of said premises, to be used as the business offices of said persons and corporations, and for no other purpose, under a form of lease substantially similar to the lease to the Broadway Bank.

That nevertheless, the plaintiff wholly, arbitrarily and unreasonably refused and neglected to make any efforts to relet the premises, and wholly, arbitrarily and unreasonably refused each and every one of the aforesaid offers, and wholly, arbitrarily and unreasonably refused and declined to accept either the Beacon Trust Company or the Massachusetts Title Insurance Insurance Company, as a tenant, for any period, for the whole or any portion of the premises leased to the Broadway Bank, alleging in the case of the Beacon Trust Company that it, the plaintiff, did not wish to have a bank in said premises, and in the case of the Massachusetts Title Insurance Company that its financial condition was not sound.

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By its Attorneys, CARVER & BLODGETT.

Motion to Amend Answer.

(Filed and Allowed by Consent, November 18, 1902.)

And now comes the defendant in the above-entitled cause and moves to further amend his answer therein by the addition of the following:

And the defendant says that the Broadway National Bank was organized as a banking association under the Act of Congress passed on the third day of June, 1864, entitled, "An Act to Provide a National Currency Secured by a Pledge of United States Stocks and to Provide for the Circulation and Redemption thereof;" that under the provisions of said act it was authorized to have succession, and its corporate existence was fixed for a period of twenty years

only from the date of its organization, to wit, to the period of October 3, 1884; that under the provisions of "Act of Congress to Enable National Banking Associations to Extend their Corporate Existence and for other Purposes," approved July 12, 1882, the term of succession of said corporation was extended until the close of business on October 3, 1904; that on such extension said bank was authorized and empowered by law to do business and make contracts extending to the third day of October, 1904, but for no further period; that the lease declared on by the plaintiff was beyond the power of said bank and is illegal and null and void, and that R. C. Downer, its president, had no power or authority to execute in the name of said bank said lease.

By his Attorneys, CARVER & BLODGETT.

19 ' At the said October Term, A. D. 1904, the following Amended Answer is filed by consent:—

Amended Answer.

(Filed by Consent, November 5, 1904.)

And now comes the defendant in the above-entitled cause and moves to amend his answer therein, so that the same shall read as follows:

"And now comes the defendant in the above-entitled cause and for answer denies each and every item and allegation in the plaintiff's writ and declaration contained.

And further answering the defendant says that, if he ever owed the plaintiff anything, he has paid the same in full, and now owes the plaintiff nothing.

And further answering the defendant says that upon terminating the lease as set forth in the plaintiff's declaration it became the plaintiff's duty to use all reasonable efforts to relet the premises described in said lease so as to minimize the damages, if any, which the defendant may be or become liable to pay to the plaintiff by reason of said lease, or any clause contained therein, and especially by reason of a clause in said lease authorizing the lessors at their discretion to relet the premises at the risk of the lessee and stipulating that the lessee should remain for the residue of the term of the lease responsible for the rent therein reserved; that if the plaintiff had used reasonable efforts as aforesaid to relet the *the* premises, either personally or through brokers, suitable and responsible parties could and would have been found who would have been ready and willing to become tenants of the premises aforesaid either as tenants at will or under a written lease, and who would have agreed that the premises should be used as the business office of said tenants, and for no other purpose; that nevertheless the plaintiff has not used reasonable efforts as aforesaid and has not used any efforts to relet the premises so as to minimize the damage, if any, which the defendants may be or become liable to pay to the plaintiff as aforesaid; that, on the contrary, although suitable and responsible parties have been

ready and willing, and, directly, and through real estate brokers and otherwise, have offered at various times to become tenants of the premises in question, either as tenants at will or under
20 written lease, at a rent as great or greater than the rent reserved in the lease to the Broadway Bank, and to agree that the premises should be used for the business offices of said tenants, and for no other purpose, the plaintiff has wholly and arbitrarily refused to accept such parties as tenants in any way, shape or manner.

And further answering the defendant says that suitable and reasonable parties were ready and willing and actually offered to take a lease of the said premises from the plaintiff at a rent greater than that or as great as that reserved in the lease, and to agree that the premises should be used for the business offices of such parties, and for no other purpose, and such parties were so ready and willing and made such offers at such times and in such manner that if said parties or any of them had been accepted as tenants by the plaintiff, the plaintiff would have received rent for the said premises during the whole of the period for which rent was claimed in the plaintiff's declaration; that the amount of rent which the plaintiff would so have received would have been as great as or greater than the rent reserved in the lease; that nevertheless the plaintiff wholly and arbitrarily refused to accept said parties, or any of them, as tenants of the premises aforesaid.

And further answering the defendant says that when the said lease was terminated by the plaintiff as set forth in the declaration, the basement of the premises leased to the Broadway Bank had been theretofore sublet by it and was then occupied by the sub-tenants of the said bank at a rental of one hundred (100) dollars per month; that when the said lease of the Broadway Bank was terminated as aforesaid, the plaintiff accepted the said sub-tenants at the rental aforesaid and collected said rents from them and credited the defendant with the rents so collected from the termination of the said lease as aforesaid to a period subsequent to the time when the last of the offers hereinafter referred to was made, and the said tenants so accepted by the plaintiff remained in occupation and continued to pay rent as aforesaid during all the said time from the termination of said lease to a period subsequent to the last of the said offers hereinafter mentioned; that on or about April 30, 1900, the defendant, by his attorney, Edward E. Blodgett, offered to the plaintiff as a tenant for all the premises leased to the Broadway Bank as in
21 the declaration set forth, except the basement, the Beacon Trust Company a corporation organized under the laws of Massachusetts and doing business in the city of Boston, in said State, for the balance of the term of the lease under a form of lease identical with that of the lease to the said Broadway Bank; that on or about September 21, 1900, the defendant, through his agents and brokers, Whitcomb & Wead, again offered to the plaintiff the said Beacon Trust Company as a tenant for said premises, exclusive of the basement, upon the said terms; that the said Beacon Trust Company was during the whole of the year 1900, has been since, and is now in every way a suitable and responsible party as a tenant and

was when said offers were made ready and willing and offered the plaintiff to take a lease of the premises as aforesaid to be used as the business offices of said corporation, and for no other purpose; that on or about November 9, 1900, the defendant offered to the plaintiff as a tenant for all the premises leased to the Broadway Bank, except the basement, under a lease identical in terms with the lease to the Broadway Bank, the Massachusetts Title Insurance Company, a corporation organized under the laws of Massachusetts and doing business in the city of Boston, in said State, at a rental of four thousand five hundred (4500) dollars a year for the balance of the term; that the said Massachusetts Title Insurance Company was during the whole of the year 1900, has been since, and is now a suitable and responsible party as a tenant, and was ready and willing and offered the plaintiff at the time said offer was made to take a lease of the premises to be used as the business offices of said corporation, and for no other purpose; and that various other persons and corporations, in every way suitable and responsible, whose names are unknown to the defendant, at various times since the termination of the lease by the plaintiff as aforesaid, offered the plaintiff directly, through real estate brokers and otherwise, to take a lease of said premises to be used as the business offices of said persons and corporations, and for no purpose, under a form of lease substantially similar to the lease to the Broadway Bank.

That nevertheless the plaintiff wholly, arbitrarily and unreasonably refused and neglected to make any efforts to relet the premises, and wholly, arbitrarily and unreasonably refused each and
22 every one of the aforesaid offers, and wholly, arbitrarily and unreasonably refused and declined to accept either the Beacon Trust Company or the Massachusetts Title Insurance Company as a tenant, for any period, for the whole or any portion of the premises leased to the Broadway Bank, alleging in the case of the Beacon Trust Company that it, the plaintiff, did not wish to have a bank in said premises and in the case of the Massachusetts Title Insurance Company that its financial condition was not sound.

And further answering the defendant says that the Broadway National Bank was organized as a banking association under the Act of Congress passed on the third day of June, 1864, entitled, 'An Act to Provide a National Currency Secured by a Pledge of the United States Stocks and to Provide for the Circulation and Redemption thereof;' that under the provisions of said act it was authorized to have succession, and its corporate existence was fixed for a period of twenty years only from the date of its organization, to wit: to the period of October 3, 1884; that under the same provisions of 'Act of Congress to Enable National Banking Associations to Extend their Corporate Existence and for Other Purposes,' approved July 12, 1882, the term of succession of said corporation was extended until the close of business on October 3, 1904; that on such extension said bank was authorized and empowered by law to do business and make contracts extending to the third day of October, 1904, but for no further period; that the lease declared on by the plaintiff was beyond the power of said bank and is illegal and

null and void and that R. C. Downer, its president, had no power or authority to execute in the name of said bank said lease."

By his Attorneys, CARVER & BLODGETT.

On the seventeenth day of November, A. D. 1904, a jury is duly empaneled and sworn to try the issue, the Honorable William L. Putnam, Circuit Judge, sitting.

On the twenty-second day of November, A. D. 1904, this cause is committed to a jury, who, after hearing all matters and things concerning the same, return the following Verdict:—

23 *Verdict.*

November 22, 1904.

The jury find for the defendant.

SEYMOUR S. HARTWELL, *Foreman.*

On the twenty-fifth day of November, A. D. 1904, the following Motion for New Trial is filed:—

Motion for New Trial.

(Filed November 25, 1904.)

And now comes the plaintiff and moves that the verdict for defendant be set aside and a new trial granted because it says that said verdict was against the evidence and the weight of the evidence and the instructions of the Court.

By its Attorney W. M. RICHARDSON
Attorney for Plaintiff.

On the fourteenth day of December, A. D. 1904, the foregoing Motion for New Trial is heard by the Court, the Honorable William L. Putnam, Circuit Judge, as aforesaid, sitting.

On the twenty-seventh day of December, A. D. 1904, the Opinion of the Court is announced, denying the motion for new trial.

On the twenty-fifth day of January, A. D. 1905, the following Plaintiff's Bill of Exceptions is filed and allowed:—

Plaintiff's Bill of Exceptions.

(Filed and Allowed January 25, 1905.)

This is an action of contract to recover under the terms of a written lease of a portion of the premises numbered 39 Milk Street in the city of Boston. Said premises at the time the suit was brought were owned in fee by the plaintiff company, and a portion of
24 them on August 11, 1898, had by the plaintiff's predecessors in title, been demised by the lease in question to the

Broadway National Bank, a national banking corporation organized under the laws of the United States, and having its usual place of business in Boston aforesaid. The plaintiff is a corporation duly organized under the laws of the Commonwealth of Massachusetts, and having its usual place of business at said Boston. The defendant is the agent of the stockholders of the Broadway National Bank, duly elected by them as such agent on January 2, 1900, pursuant to the Act of Congress of June 30, 1876 (19 Stat. 63), and the Acts amendatory thereof and supplemental thereto. The writ was dated June 21, 1901. The charge to the jury is made a part of these exceptions. The amount sought to be recovered in this action is $5668.45, the same being equal to the amount of rent due under the lease from May 19, 1900, to May 31, 1901, less the amounts collected by the plaintiff from the tenants and occupants of the demised premises as shown on the account hereto annexed and marked "Exhibit 11."

The jury took a view of the premises.

At the trial the plaintiff introduced evidence tending to show its title in fee to the demised premises acquired before the failure of the Broadway National Bank, and the lease from Henry Parkman and others, predecessors in title of the plaintiff to the Broadway National Bank of Boston, dated August 11, 1898, for the term of ten years from the first day of April, 1899, at a rental of $6000 per annum, of the first floor and basement of the premises at 39 Milk Street in the city of Boston. A copy of the lease is hereto annexed marked "Exhibit 7."

The plaintiff introduced evidence that the bank became insolvent and that a receiver was duly appointed December 16, 1899; that the Comptroller of the Currency, on February 15, 1900, released the estate of the bank to John W. Weeks, stockholders' agent; that after December 16, 1899, and on or before January 5, 1900, the president of the plaintiff corporation, in its name and behalf, entered upon the demised premises and repossessed the plaintiff of the same as of its former estate, in accordance with the provisions of the lease, and that the plaintiff has held possession of the premises since that time.

25 The demised premises were occupied by the receiver and afterwards by the stockholders' agent from the time of the failure of the bank up to and including May 18, 1900, and full compensation therefor to the amount of the rent referred to in the lease was paid to the plaintiff. This occupancy and payment therefor were under an agreement between the parties that the same should not affect or prejudice their respective legal rights.

The plaintiff offered in evidence certain correspondence between its president and Mr. Weeks, copies of the letters being hereto annexed, marked "Plaintiff's Exhibits 12 and 13," and on each and every month, during the period covered by the claim in suit, duly demanded of the defendant payment of the amount reserved as rent in the lease. Plaintiff also offered evidence tending to show that it let the basement of the demised premises during the time covered by the claim in suit for its full value, and received rent therefor

which is accounted for in the statement of claim annexed. The plaintiff did not in fact let the first floor of the demised premises during the time covered by the claim in suit, and it was in controversy between the parties whether it used reasonable efforts to relet the premises, and whether, assuming that the plaintiff had elected to relet at the risk of the defendant, it had abandoned its election by an unreasonable refusal to accept a suitable tenant.

John M. Graham, called as a witness by the plaintiff, testified that he was president of the International Trust Company; that said company owned the premises on the corner of Milk and Devonshire Streets, occupying the basement thereof for its safe deposit vaults, and the first floor for its banking rooms; that the company did a general banking and trust company business; that he purchased the aljoining estate for the trust company; that the Broadway Bank was a tenant of the first floor and basement of the building, occupying the first floor for its banking rooms, and sub-letting the basement; that after the receiver of the Broadway Bank was appointed the banking premises were used for the purpose of liquidating the affairs of the bank until some time in February, the receiver paying for his occupation in full; that the trust company entered into occupation and repossessed itself of its estate in the premises after the failure of the bank on January 5, 1900; that the defend-
26 ant occupied the banking rooms as agent of the stockholders of the bank from the time the receiver went out until May 19, 1900, and paid the rent in full up to that time, when he gave up the occupation of the premises; that he left the premises in a very shabby and unattractive condition; that nothing was left in the shape of a fixture; that the walls were badly marred, the plastering was broken and some of the finish taken off; the wainscoting was damaged and broken down; the casing around the vault was torn off; and, in general, the premises were rather dilapidated in appearance and in very poor condition as regards paint or other finish; that after the defendant vacated the premises, he, the witness, sent for Mr. C. W. Whitter, a real estate agent, and employed him to rent the premises; that said Whitter put up signs in the windows advertising the premises for rent; that the trust company, whenever they had an opportunity, approached any one they thought would be likely to occupy the premises; that among others they approached Armstrong & Company, later succeeded by Armstrong, Schirmer & Company; that they preferred to remain where they were; that the witness also approached S. D. Loring & Company, but they took another office; that said Loring was a dealer in investment securities and had been in business for a number of years and was quite a large concern; that the witness approached C. S. Cummings & Company; that they preferred to take the large front office in the same building above the banking rooms; that he made a demand on Mr. Weeks for the rent every month for the whole period covered by the suit, but no rent was paid; that the basement was occupied, at the time the trust company took the premises, by a barber shop on one side, which remained up to the present time, and also by a boot and shoe store which failed and which was succeeded after a while

by a flower store; that after the florist went out it was rented again to a shoe store; that rent had been received pretty much all the time for the basement and was credited on account; that Mr. Whittier offered the Beacon Trust Company as a tenant, a small trust company with a capital of $300,000; that the witness declined them as tenants because they were a competing company; that in his judgment it would not have been in the interest of the International Trust Company to have the Beacon Trust Company established in those
27 premises; that the Beacon Trust Company would do practically the same kind of business that the plaintiff trust company was doing, and the corner entrance of the premises, formerly occupied by the Broadway Bank, would be the first entrance people would come to and they would mistake it for the entrance of the plaintiff company; that there were numerous reasons why it would not have been desirable to have a trust company there; that the witness tried to rent the premises to Mr. McDowell, representing the New York Life Insurance Company, but was not able to secure him as a tenant, as the premises were not large enough; that the defendant suggested the Massachusetts Title Insurance Company as a tenant, but the witness objected, because their stock was selling for twenty-five cents on the dollar and he did not think they were a suitable tenant and it was not in the interest of the trust company to take them as a tenant; that in the witness's judgment the Massachusetts Title Insurance Company was not financially responsible to take the lease; that his conversation with Mr. Weeks was in the latter part of 1901, or it might have been early in 1902; that the trust company had quite a number of applications from parties who wanted to open a café or restaurant there; that these offers were all turned down as he did not think it for the interest of the trust company to have anything of that kind in the building, that it would be very objectionable to the tenants; that it would hurt the reputation of the building and that the odors would be very objectionable; that the witness either wrote a letter to or saw personally Mr. Aldrich of the State National Bank; that the bank was committed to a location elsewhere; that the price the witness gave to Armstrong & Company was $6000 for the same premises occupied by the Broadway Bank; that he had a talk with Alland Brothers who were represented by Mr. Whittier and wanted the floor lowered below the level of the street and various other expensive operations which were impracticable; that they were merchant tailors; that they desired the floor lowered to the level of the street and the windows lowered, which would ruin the basement; that the cost of these alterations would be $14,000 or $15,000, and it would have cost to lower the windows $2000 or $2,500; that it was not in witness's judgment wise or reasonable on the part of the trust company to make such extensive
28 changes; that Alland Brothers wanted the premises fixed up generally, involving a cost of from $2000 to $2,500; that there were other persons he talked to but did not at the moment recall them; that there were three other banking locations vacant at this time, the premises formerly occupied by the National Revere Bank, those formerly occupied by the North National Bank and those

formerly occupied by the National Bank of North America, all on three opposite diagonal corners; that the Revere Bank was on the northerly corner of Devonshire and Franklin Streets, Franklin Street being the next beyond Milk, running parallel to it; that those premises became vacant about 1898 and remained so about four years; that the Bank of North America was on the opposite side, and the third bank, the North National Bank, was "on that corner" (showing on plan); that the North Bank rooms became vacant about the same time and the Bank of North America rooms a little later; that the North Bank rooms were leased about two and one half years before, or about 1900, and that the Bank of North America rooms were leased about a year before the trial; that the premises formerly occupied by the North Bank were then occupied by the American Bank; that the Bank of Redemption occupied premises formerly occupied by the Bank of North America; that the Revere Bank premises were vacant four and one half years; the North Bank premises for two years, the Bank of North America premises for about one and one half years; that the effect of the vacancy of those other banking institutions was very unfavorable upon his ability to rent the premises in question; that he did not succeed in finding a tenant to take the banking rooms at the rent provided for in the lease, or any rent, and said premises have in fact been vacant ever since defendant moved; that the basement had been let most of the time; that the rentals received from the basement were the same as the amounts received as sub-rent by the Broadway Bank, so that the credits on the accounts were practically the entire rents for the basement.

On cross-examination

The witness testified that the capital of the trust company was one million dollars; that the surplus in 1900 was $2,000,000; that the company occupied as its place of business, an eight-story
29 building on the corner of Devonshire and Milk Streets, which it built and owned, occupying one half of the basement and the first floor, the basement for safe deposit vaults and transfer and trust department, and upstairs for general banking business; that the company did a general bank and trust company business, besides loaning money on notes and commercial paper, acting as trustee under mortgages to secure bonds of railroads and other corporations, as trustee under wills, dealing in foreign exchange and conducting safe deposit vaults, and since as executors under wills; that its business as trustee under wills was about $1,500,000 at that time; that its general banking business or loaning on notes at that time was about $9,000,000 or $10,000,000; that the company was one of the largest trust companies in Boston; that the New England Trust Company, the Boston Safe Deposit & Trust Company and the Old Colony Trust Company were all about the same size; that no one of the three did the same class of business as the plaintiff company; that some did act as trustees and had safe deposit vaults, but none of them discounted commercial paper; that discounting commercial paper was quite an item in the business of the plaintiff

company; that the Boston Safe Deposit & Trust Company was at 87 Milk Street, and the plaintiff company was at 45 on the same side; that the New England Trust Company was on Devonshire Street, corner of Water, one block away on Devonshire Street, or two blocks counting Spring Lane; that the Old Colony Trust Company was on Washington Street at the head of State Street; that all the trust companies in Boston did the same general class of business; that the Beacon Trust Company did the same class of business that the plaintiff company did; that he made no inquiry as to the business of the Beacon Trust Company when it was proposed as tenant; that he understood the Beacon Trust Company did act as executor under wills; that its capital was $200,000, and he considered it financially responsible; that he only had an impression as to whether they had any safety vaults; that he could not say they were going to do so; that they could have had one on the same floor without the basement, but he did not think anything about it; that his objection was not to anyone who did a general banking business—his objection to the trust company was because it was a trust company, even although it was only doing a general banking business, because anyone on the way to transact business with a bank would go to a national bank, anyone desiring to do business with a trust company would go to a trust company; that he objected to the name and to the business; that if he had understood that the Beacon Trust Company did only a general banking business he did not think that he would have objected except for the name; but that he did not know how soon they might do all the lines of business the plaintiff company was doing; that he did not inquire as to what business they were doing. That besides these objections he did not think it was in accordance with the terms of the lease under which the Broadway Bank occupied. That the trust company collected the rents from the tenants of the basement from the day it entered and also from the receiver and from the receiver and stockholders' agent; that he bought the premises adjoining the trust company premises to control; that at the time of the purchase there was no definite purpose on the part of the trust company to erect a building covering the corner; that he might have stated that the lease in question was given while he was negotiating for the purchase of the property; that he had to be satisfied to have the lease on the property; that he said "it was not a nice thing to do," or something to that effect, on the part of the Broadway Bank to have taken that lease when it knew he was trying to buy the building; that he did not make any record of the parties who came to him in reference to the property; that after the receiver came in he collected the rent at the rate of $3900 a year for the banking rooms which was all he had to get to make him whole barring any vacancy; that he was looking out for a tenant before Mr. Weeks vacated, and spoke to Mr. C. S. Cummings; that Cummings paid for the rooms upstairs $1000 or $1200; that the witness had several talks with Mr. Weeks before he was appointed stockholders' agent; that he told Mr. Weeks that the trust company would hold the bank responsible; that the witness had only one offer direct from Mr. Weeks,

namely, the Massachusetts Title Insurance Company; that the Beacon Trust Company was offered to him before Mr. Weeks went out; that he was not sure about the Title Insurance Company; that they both agreed to pay $4500 a year for the banking rooms; that the Beacon Trust Company was to pay $4500, and the Title
31 Insurance Company $4000 a year for the banking rooms; that he did nothing about looking up the financial responsibility of the Title Insurance Company except to see what the last sale of the stock was and his general information in regard to the business they were doing; that Mr. Weeks might have sent him a certificate of their condition; that the stock was not a listed or an active stock and he had to look back a year to get a quotation; that if the Title Insurance Company had been financially responsible he would have accepted them as a tenant; that he considered the Broadway Bank liable for the rent of that property at the time; that he did not know how the assets of the Broadway Bank would pan out; that, whatever they were, he knew he could have them back of the insurance company; that the insurance company used to have offices near him on Milk Street, but larger than those of the Broadway Bank, and as far as he knew it always met its obligations and never knew of anyone having a claim against them that was not paid promptly; that he presumed that they paid their rent promptly in the Devonshire Building, where they were when offered as a tenant; that he knew from general information how large a business they were doing; perhaps not so much as they had done before that; that he did not make any inquiries; that the insurance company at the time of the trial was located on State Street and the last he knew it was on the ground floor in a large building; that Mr. Whittier put up his sign right after Mr. Weeks went out and kept it up about a year; that Mr. Weeks went out in the spring and the sign was taken out in the winter; that he gave Mr. Whittier $4000 as a price for the banking rooms; that Mr. Whittier spoke about the Beacon Trust Company and the Massachusetts Title Insurance Company and also about Alland Brothers; that witness did not remember their speaking about the Merchants Despatch Express Company; that they did say something about a bank; that he was not sure the price was mentioned; because his proposition could not be entertained at that time inasmuch as he was negotiating with Alland Brothers in regard to taking the premises; that he expected to modify the repairs so as to simply lower the windows without lowering the floor; that the repairs would cost about $5000; that he was considering at the time taking Alland Brothers and making
32 $5000 worth of repairs; that he never got to an agreement with Alland Brothers, because they insisted upon the floor being lowered; that after the Alland Brothers lease fell through he did not attempt to see Mr. Whittier to see whether or not he could get a lease from the bank, because Mr. Whittier took out his sign; that when he told Mr. Whittier he could not consider the bank, because he was talking with Alland Brothers, Mr. Whittier took out the sign, as he was a little hurt because the trust company could not entertain his proposition at that time; that nothing defi-

nite was ever mentioned as to price with Alland Brothers; that from the time Mr. Whittier took out his sign no brokers have had their signs in the windows and no brokers have had the property for rent; that he offered the premises to Mr. Loring in 1902, in the spring; that Armstrong was in 1902; that he offered it to the State National Bank late in 1901 or early in 1902, from November 1 to March 1; that Cummings was in 1900; that he could not give the names of any other persons to whom he offered the premises between January and November, 1901; that he offered the premises to Loring sometime in 1902.

At this point the stenographer's notes of the witness's testimony at a previous trial of the case were read, in which he said that he had never quoted a price under $6000 for the banking rooms. The witness then testified that he was not correctly quoted.

On redirect examination

The witness testified that the same objection did not apply to having a national bank in the premises in question, as would apply to a trust company; that a national bank does a different business from a trust company.

On recross-examination

The witness testified that he had not made any long term lease in the Broadway Bank Building; that he had Mr. Preston draw sketches in relation to the building before the date of the first trial of this case in 1902; that shortly after he entered and cancelled the Broadway Bank lease he went to his architect, had sketches drawn, and considered plans for extensive alterations in the building; that the entrance to the stairway was not to be moved, it was to be improved;

33 that the company did not arrive at any conclusion with regard to adding the adjoining building to the building of the International Trust Company and connecting them together; that it had never been presented for the consideration of the directors and that it could not have been done without being so presented; that he did not have to go to the directors to determine whether he would lease the property or cancel a lease; that he would have that authority; that this matter of the Broadway Bank lease had never been brought to the attention of the board of directors up to the time of the trial. He further stated that he did not think that the condition in which the premises were left by the defendant was urgued as a reason for the refusal of anyone to take or lease the premises; that it is a question whether it had anything to do with the matter of reletting them; that there had been very uncomplimentary remarks made in regard to their condition; that he volunteered to put the premises into condition for S. D. Loring and Armstrong, Schirmer & Company; that he did not think he mentioned the amount of cost; that he thinks it would have cost $2500; that he would either have to repair the tiling or put in a new floor; that the marble wainscoting was very much damaged and two sides would have to be repaired; the finish around the vault would have to be repaired; the plastering and the black walnut finish work would have

to be repaired; the ceilings would have to be retinted and decorated; that the damage was an extraordinary damage; that he thought it was done in taking out the property of the bank and that there was damage done not by taking out the property, such as damage to the plastering and breaking of the marble; that he had not made any claim on the defendant for the damage, nor spoken to him or his counsel about it, and that it is the first time he had made such a claim.

FRANK A. SCHIRMER, called as witness by the plaintiff, testified that he was in the stock brokerage and banking business; was one of the firm of Armstrong, Schirmer & Company, successors to George E. Armstrong & Company; that he had a talk with Mr. Graham with reference to taking the premises in question about three years before the trial, that is, November, 1901; that they had the matter under consideration for two or three days, but finally decided to stay where they were and notified Mr. Graham to that effect.

34 On cross-examination

The witness testified that Mr. Graham asked $6000, for the banking rooms alone.

CHARLES S. CUMMINGS, a witness called by the plaintiff, testified that his business was that of a bond broker and general investment securities; that he was a member of the firm of Burdett, Cummings & Company; that they went into their offices in the Broadway Bank building on February 1, 1900; that their offices were directly over the Broadway Bank rooms; that they occupied as a tenant at will at the time of the trial, although they had had a lease; that Mr. Graham made several attempts to have them take the premises formerly occupied by the Broadway Bank but they were too expensive.

On cross-examination

The witness testified that the negotiations were in the month of January, 1900; that he could not remember the figures exactly, but would judge it was from $3500 to $5000; that Mr. Graham knew his financial condition at the time; that they were at the time occupying temporary quarters and were paying $100 per month.

CORWIN MCDOWELL, a witness called by the plaintiff testified that he was manager for the branch office of the New York Life Insurance Company; that he had negotiations with Mr. Graham in regard to taking the premises formerly ocupied by the Broadway Bank in the spring of 1902; that he decided he could not pay the rent and there was not room enough; that Mr. Graham offered the basement as well as the banking rooms for $6000 and fix it up suitable for the witness's purposes, but the rent was too high.

On cross-examination

The witness testified that while the Insurance Company would be responsible for the rent, he thought that the business of the Boston

office would not warrant it; that he talked with Mr. Graham in the spring of 1902.

ALONZO W. PERRY, a witness called by the plaintiff, testified that his business was real estate, and that he was an owner of real estate in Boston; that he owned the Rich Building on the corner of
35 Devonshire Street and Franklin Street, and the Wellington Building on the corner of Bedford and Chauncy Streets, and several pieces of his own; that his business had been the leasing of office buildings for a long term of years, and then subletting them; that the Rich Building was the one in which the North National Bank was, which were tenants of his; that they vacated in December, 1898; that he put signs in the windows, and employed two or three brokers to see what they could do, and also went around to see several banks when their leases expired to see if he could not get them in there; that he let the premises July 1, 1901, to the American National Bank; that there were two other banking rooms in his vicinity vacant, one diagonally across and one directly opposite, the Revere and North American; that the Revere Bank premises were vacant four years afterwards and the North American a year and one half; that at that time thirteen banks in Boston were liquidating, among them the North; that the North was liquidated in December, 1898; that he could not find any demand at that time for banking premises; that a sign in the window on a well-travelled street is the best way of advertising for tenants.

On cross-examination

He testified that he did not know of any other banking rooms on Milk Street that were vacant at this time; that most of the brokerage firms and banks kept north of Franklin Street; that stock brokers and bond brokers didn't occupy premises on Franklin Street; that they constituted a large part of the expensive offices in what is called the Down Town District; that there are more firms of stock brokers and bankers in Boston than there were national banks and trust companies; that the market north of Franklin Street, from Milk Street to State Street, had a larger posible lot of customers than the property on Franklin Street; that Milk Street was a better location than Franklin Street, a very much better location; that he leased his premises to the American National Bank when the Bank of Redemption went into their premises directly opposite; that it was a benefit to the American Naitonal Bank to have their office across the street from the Redemption; that it was a benefit to any bank to have the Redemption on the
36 corner, and did not hurt the Redemption to have another bank on the corner; that a small bank would not conflict with a large bank like the Redemption or First National.

ALEXANDER S. PORTER, a witness called by the plaintiff, testified that he was a real estate broker, with a varied and constant experience in buying, selling and leasing real estate in Boston, including large pieces of property; that in 1900 and 1901 and 1902, fifteen

or twenty banks went out of existence, and a large number of them gave up their premises; that he did not know of any customers for the Broadway Bank during those years; that to employ a first rate broker and tell him to put his sign up was a reasonable and proper and customary way to proceed; that it was not necessary to advertise; that it took a long while to find a customer for a good-sized bank.

On cross-examination

The witness testified that Milk Street was a considerably better location than Franklin Street for banking purposes; that bankers congregate together and congregate near each other; that banks and trust companies congregate together; that there were three or four on the same street, and on State Street they were side by side, one on one side, and across the street; that it was not regarded as a detriment to a bank to get into a location where there were other banks; that in speaking of banks, trust companies would be the same thing.

HORACE S. CROWELL, testified that he was in the real estate business; that it had been part of his business to take care of estates in the business section of Boston and to rent and to sell them, and keep track of rental values in the city proper and in the particular location in which the Broadway Bank was situated.

That the banking district in Boston was from Milk Street to State Street inclusive, and from about Merchants Row up to about Court Street; that outside of that the banks were few and of generally small capital, or otherwise there for some special purpose; that banks like to center, to bunch as you might call it; that Boston was particularly noted for that; that it made a business center; that it was very common to have several banks in one building; and trust companies the same, immediately adjacent, immediately
37 near the centre; that a fair market value for the premises formerly occupied by the Broadway Bank in the spring of 1900, or thereabouts, was $6000; that the fair market value of the first floor at that time was $5000; that it would have taken three to six months with the exercise of reasonable efforts in the year 1900 to have obtained a suitable tenant for the premises at the rentals mentioned.

On cross-examination

The witness testified that, beyond a matter of opinion, he did not claim to have such knowledge of the future that he could tell when you could get a satisfactory tenant of a piece of real estate; that his testimony was a guess based on general knowledge; that there were at the time of the trial three vacant stores in the new Old South Building on Milk Street; that they were handsome and suitable for many purposes; that without looking up the matter he could not tell when these stores would be occupied; that he should want to know what the rentals would be; that at a reasonable rental he should say three to six months; that he was aware, nevertheless, that

they had been vacant ever since the building had been erected; that he knew the store in the Boston Post Building on the other side of Milk Street; that it looked very desirable and that it had been vacant for a long time; that supposing a reasonable rent was asked, he should think it would take about the same time to rent it; that every store in Boston would be occupied in six months if the owner asked a reasonable rental. Asked how he could explain it if every vacant store in Boston could be occupied in six months, that so many of them were vacant so long, witness replied that prices, until there was such surplus of stores, were higher; that the rental had been firmer and that it was simply a matter of supply and demand; that he did not know there were buildings standing vacant for years in whole or in part where the owners were willing to let them for reasonable rentals down town; that in regard to all those places on Milk Street, he thought that there was a difference of opinion between the proposed lessee and the owner, otherwise they would have been occupied; that those stores would be occupied, but that it was a question of price; that if the owners of all the vacant stores in the business part of Boston were willing to take a reasonable price, he was inclined to think they would be let within six months; that he did not suppose the reason banks happen to get near each other was because they desired to get near each other, that the controlling motive was to get near the customers; that he meant that a large number of the banks and trust companies congregate in the district to which he referred; that there was quite a number of banks outside of that; that he didn't know where the Mechanic's Bank was located; that he thought it came from South Boston; that he recalled it had been located at the corner of Franklin and Washington Streets for ten years; that that was outside of the district; that the First National Bank was temporarily located at the corner of Franklin and Devonshire Streets in the quarters formerly occupied by the Bank of Redemption and before that by the Bank of North America; that this was outside of the district; that the American National Bank was opposite the First National Bank, where the North Bank was located outside of the district; that the Freeman's National Bank was located at Summer Street, outside of the district, as was also the Colonial Trust Company; that he didn't know where the Boylston National Bank was; that they were on the corner of Essex and Washington Streets; that he hadn't looked up the location of banks very thoroughly lately; that he didn't know where the Bay State Trust Company was located; there were no banking rooms vacant between Washington Street and Post Office Square, except the Broadway Bank; that the premises occupied by the Central National Bank were occupied by it in 1900.

38

On re-cross examination

The witness testified that the Central Bank vacated the premises at some time; that those premises were opposite the Post Office; that the premises were vacant at the time of the trial; that there had been no sign in the window.

ALBERT R. WHITTIER, Jr., a witness called by defendant, testified that his business was real estate, mortgages and broker, with a partner, his brother, Charles W. Whittier; that he dealt largely in down-town property; that they made that their specialty; that they had in their charge buildings for rent and for sale, down-town business property; that they were the owners of down-town business
39 property and kept records in relation to rental values of business property down town; that he first knew of the vacancy of the Broadway Bank premises about January, 1900, through Mr. Graham; saw his sign in the window; that his firm was employed by Mr. Graham to rent the premises about February, 1900; that the price given was $4000 for the main floor and $2000 for the basement, both to be hired for $6000; that the basements were both occupied at at that time; that his firm received some applications for the premises from various tenants; that the Beacon Trust Company offered $4000 for the main floor about March, 1900, which offer was submitted to Mr. Graham, who refused the offer; that the next proposition was for Alland Brothers, tailors, to take the premises for $4000 per year, on a five years' lease, conditional on certain changes being made in the premises, involving a material change in the front among other things, but no change in the floor, a change in the windows and the front; that this offer was submitted to Mr. Graham and refused about April, 1900. The next proposition was from the Massachusetts Title Insurance Company to take the main floor for $4500 about September, 1900, which was submitted to Mr. Graham, who refused on the ground that the company did not have sufficient financial strength; that he had charge of renting the property from February, 1900, to January, 1901, when he withdrew his signs from the window; that two other applications were made to his firm for the premises during that time, to wit, the Merchants Despatch Transportation Company and the Commercial National Bank; about January, 1901, a proposition was received by his firm from the Commercial National Bank; that in his judgment the fair market value of the main floor at the time was $4000 to $4500, and that the fair market value of the entire premises, both banking rooms and basements, was from $5600 to $5700; that in February, 1900, it would have taken six or seven months to have found a reasonable and proper tenant by the use of reasonable efforts; that at that time there were no other rooms suitable for banking purposes vacant on Milk Street between Post Office Square and Washington Street; that the majority of the banks were between Franklin Street and Faneuil Hall Market; that in 1900 property such as the Broadway Bank rooms on Milk Street were more easily rentable than property
40 on Franklin Street of a similar kind; that most of the banks and trust companies were in the financial centre of the city; that banks and trust companies congregate on Milk Street and State Street; that the Central National Bank premises were occupied in 1900; that he should say they became vacant early in 1903.

On cross-examination

The witness testified that he could not say whether there were any other banking rooms vacant in 1900 besides the Broadway Bank,

nor whether there were any vacant in 1901; that if there were several banking rooms vacant during 1900, 1901 and 1902, that fact would affect somewhat the market for banking rooms; that he would not absolutely venture to predict in regard to any particular locality when vacant premises therein would be filled; that the vacant stores in the Old South Building were very attractive; that he could not tell absolutely when they would be occupied.

JOHN A. GALE, a witness called by the defendant, testified that he was president of the Beacon Trust Company which had a capital of $300,000, and a surplus of $380,000; that in 1900 the Beacon Trust Company did practically a general banking business and acted as trustees in some cases, not under wills, but in stocks where stocks are required to have a trustee to be certified to; that his company never had acted under wills and had very few safe deposit vaults, as a rule, given to their customers without charge; that their location at the time of the trial was 197 Washington Street, in the Sears Building, on the corner of Court and Washington Streets, on the opposite corner of Court Street from the Old Colony Trust Company, which was one of the largest trust companies in Boston; that the Second National Bank and National Bank of Commerce, the bank of Nova Scotia, the Webster and Atlas Bank and Winthrop Bank were in the same building with his bank; that the State Street Trust Company was not far away, and on Court Street were the Prudential and United States Trust Companies; that the State Street Trust Company was on State Street, a very short distance away; the other two trust companies mentioned were up Court Street; that there were five or six trust companies within a radius of 300 feet each way;
41 that in the spring of 1900 he looked at the Broadway Bank premises; that it was in the early spring, along the 1st of April; that he thought the location would be a favorable one and had no objection on account of the proximity of the International Trust Company; that he saw Mr. Graham with reference to taking the premises, but Mr. Graham did not care to rent them to the Beacon Trust Company.

A written offer to take the premises from the witness to Whitcomb, Wead & Company, dated April 27, 1900, was then introduced in evidence and marked "Defendant's Exhibit F," a copy of which is hereto annexed; that the fixtures referred to in the letter had been used in the building by the Broadway Bank; that they were there at the time and had not been removed; that he did not make any offer personally to Mr. Graham, but through a broker, and that the offer was refused; that no definite reason was given for refusing; that later in the year he made another trial; that he knew Mr. O. M. Dennett and his handwriting; that he was treasurer of the Beacon Trust Company at that time.

A letter was then introduced, dated September 21, 1900, from the Beacon Trust Company to Whitcomb, Wead & Company, marked "Exhibit G," a copy of which is hereto annexed.

That at the time the letter was written they were still ready and willing to take a lease of the premises at the rental named if they

could have got them; that the offers covered the first floor without the basement, and the offer was $4500 for the first floor; that in his opinion it was no objection for two trust companies or two banks to have rooms side by side with different entrances separated by 40 or 50 feet or more; the more you could get of one business together, the better the location is; that two trust companies so located would not compete with each other.

On cross-examination

The witness testified that there was competition in the trust company business as well as in other kinds of business; that if a carpenter did the principal business or a large share of the principal business of the town, if another carpenter should occupy the room adjoining or a part of the same premises occupied by the first man, it might affect the business of the first man; that that did not apply so closely to the banking business as it would to another kind of
42 business; that Mr. Graham did not give that as a reason for not wishing to take the Beacon Trust Company as a tenant; that he presumed that the business of the Beacon Trust Company was substantially of the same character as that of the International Trust Company in a general way; that his first offer in April was conditional on his being able to dispose of his existing lease; that that ran out March 31, 1901, he thought; that they were not able to dispose of it and remained there, not only the length of the lease, but as tenants at will for six months after that; that their other offer in September was an offer to be open one day and was not to be renewed during that time.

On redirect examination

The witness testified that the Beacon Trust Company would compete just as much with the International Trust Company in is location on State Street as it would if it were in the Broadway Bank Building on Milk Street; that they had continued to try to sublet the lease where they were when they made the offers in question; that they remained there as a tenant at will because they had effected a lease of the quarters occupied by them at the time of the trial, but could not get immediate possession of them; that this was from April to December about eight months; that they tried to get other offices than the Broadway National Bank.

CHARLES S. SKINNER, a witness called by the defendant, testified that he was president of the Massachusetts Title Insurance Company; that said company was first located on Milk Street and afterwards moved to Devonshire Street; that their offices on Milk Street were at the corner of Arch and Milk, on the opposite corner from the Broadway Bank; that from Milk Street they went to the tenth floor of the Devonshire Building and occupied those premises down to March, 1901; that in 1901, the company desired to change its location; that he looked at the Broadway Bank rooms; that they desired the banking rooms; that they made two offers to Whitcomb, Wead & Company, one June 14, 1900, which was refused, and an-

other November 1, 1900; that the last was made for a rental of $4500 upon the condition that tenants were found at the present rental for the company's own lease, which was about three years; that
43 tenants were found for the balance of said lease and they let their premises before the lease expired; that the November proposition for the Broadway Bank rooms was refused; that in February, 1900, his company had

Cash and Debts Receivable of	$9,244 06
Plant, consisting of Schedules, Completed Titles, etc.	182,500 00
Law Library	2,157 50
Warrant to Guarantee Fund, consisting of Mortgages	122,174 79

That their capital was $300,000 and they had a balance of $10,277.77; that his company was doing a business at that time of between $20,000 and $30,000 a year; that between 1885, when the company was formed, and 1890, a complete abstract was made of the Suffolk County records and copies were made of the plans, and that the value of the plant, schedules, titles, etc., above referred to, were arrived at in this way; that such a plant was of the greatest value; that the figures $182,500 as the actual cost of getting the plant; that the stock of the company was not listed on the stock exchange, and there was only occasionally a public sale of the stock; that the item $122,174 was a guarantee fund, which was required by law to be $120,000; that in November, 1900, the company was financially able to carry out the terms of the lease which it proposed to make for the Broadway banking house; that that offer was for the banking rooms only, of $4500.

On cross-examination

The witness testified that the company was organized in 1885; that it paid a dividend, in 1894, of two per cent; that it paid three dividends since 1894, the last one being in February previous to the trial; that the first one was in 1894, the next in February of 1903, the next in September of that year and the last in February, 1904; that the dividend in 1903 was a two per cent dividend; that the others were all two and one-half per cent dividends; that the principal business of the company was that of guaranteeing titles; that the insurance became void when the property was sold; that they could not keep any record by which they could tell what the amount of their guarantees outstanding at any particular time was; that if there should happen to be a serious flaw ascertained in a change of owners, it might involve a large liability; that the guarantee
44 fund was $122,000, but that he would be unable to state the amount of the contingent liability; that they could not have sold the assets at the figure of $182,500; that he was unable to state what that item would bring; that it represented the cost, in 1890, of preparing the digest of the records; that if it were advertised for sale no one might want to buy it; the demand would be limited; that he did not know how much of the item $9244.06 was cash and how much were debts receivable; that there was one claim of $2900

against the Quincy Granite Quarries Company which was included in that item; that the item of $2257.50 was not only the law library, but law library and plans, and represented the cost; that nothing was charged off for depreciation; that taking the assets just as they were they would have enough to pay the debts and capital stock and would have $10,000 to the good, but that if they were to charge off anything on the other items, any considerable sum, it would show that they did not have, at that time, assets sufficient to pay the debts and capital stock; that is, if they were to charge off a little over $10,000; that in 1900, or the preceding year, there had been some of the stock of the company sold; that the witness took charge of the company in January, 1900.

On redirect examination

The witness testified that prior to 1900 the company had been making very little money; that since then it had been making more; that the percentage of claims against the company on account of guarantees was very small, but they had met with one large loss in 1894, but outside of that the percentage was very small; that they had not paid a loss of over $5000, with the exception of the large loss referred to, since he had been connected with the company.

Roswell C. Downer, a witness called by the defendant, testified that he was president of the Broadway National Bank at the time it went into the hands of a receiver; that the capital of the bank was $200,000, its deposits about three or two and one-half millions; that it did a general banking business on commercial paper and on collateral; that it did business under a charter from the United States; that the charter was hung in the banking room all the time they did business; that the charter expired in October, 1904; that
45 it would not be detrimental for banks and trust companies to occupy property near to each other with reference to the effect on trade; that banks and trust companies seemed inclined to locate within a small radius; that they were near together and in the same building.

Leslie C. Wead, a witness called by the defendant, testified that he was a real estate broker and trustee; that he had to deal mostly with business properties in the down town district; that his business had been a leasing business as well as sales; that he was informed by Mr. Weeks, in 1900, that the Broadway banking rooms were to be in the market; that he had the premises put on his renting list; that the premises were offered to several people; that offers were received and propositions made in writing by other people in the office, which propositions were presented to either Mr. Weeks or Mr. Curtis, former cashier of the Broadway Bank; that he talked with them about it; that he talked with the officers of the Beacon Trust Company in regard to the premises, but he did not remember talking with the officers of the Massachusetts Title Insurance Company; that he did talk with Mr. Weeks, Mr. Curtis and Mr. Whittier, who had a

sign in the window that the offices were to rent; that the Beacon Trust Company was the first proposition received.

The witness was then shown the defendant's Exhibit F, and testified that he remembered seeing it in the office; that it was in the usual course of business submitted to Mr. Weeks; that the offer was conditional on the Beacon Trust Company being able to dispose of their lease, but in his opinion it could have been disposed of in a reasonable time, in the natural course of events in the early fall.

The witness was then shown the defendant's Exhibit G, and testified that it was the proposition received from the Beacon Trust Company; that he submitted it to Whittier who informed him that they had submitted it to Mr. Graham, and that it had been refused by him; that they procured another offer from the Massachusetts Title Insurance Company and submitted it to Mr. Weeks and Mr. Curtis; that that was the offer referred to by Mr. Skinner in his testimony; that it was submitted early in December, 1900; that he received from Mr. Weeks a request for a statement of the company; that he procured one.

46 Witness was then shown defendant's Exhibit C, and testified that that was the statement which he procured; that he knew some of the officers of the company when they were engaged in business on Milk Street; that he had rented them quarters on the top floor of the Devonshire Building; that the Title Insurance Company had been their tenants five or six years; that the rents were always paid promptly, and they were regarded as exceptionally good tenants; that the tendency of the large trust companies and banks is to get towards the financial centre; that that district covered from State Street to Milk Street and generally from Kilby Street to Washington Street; that in the Sears Building there were located three banks; that at 95 Milk Street were located the National Bank of the Republic and the Federal Trut Company; that at 40 State Street there was the State Street Trust Company, the Union National Bank and the City Trust Company in the same building; that in the Merchants National Bank Building were the Merchants National Bank, the National Exchange Bank, and formerly the Suffolk Bank; that the Boston Safe Deposit & Trust Company was at 87 Milk Street, adjoining 95; that the fair market rental value of the Broadway National Bank premises in 1900 was from $4200 to $4500; that he did not know as to the basements; that it would have taken in the year 1900 a reasonable man from one to two months to rent the Broadway Bank premises for he rental mentioned.

On cross-examination

The witness testified that he did not think of any trust company who let a part of their premises to another trust company.

On redirect examination

The witness testified that the Merchants National Bank, which owned its building at 28 State Street, has the National Exchange Bank as a tenant, and used to have also the Suffolk Bank.

JOHN W. WEEKS testified that he was a banker and broker; that he was vice-president of the First National Bank and president of the Newtonville Trust Company; that in February, 1900, he was appointed stockholders' agent of the Broadway National Bank, and gave bonds in accordance with the law therefor; that the assets remaining in the hands of the receiver were turned over to him;
47 that he had liquidated the estate and filed his final report. That when he became stockholders' agent he had no notice from Mr. Graham that he caimed any liability of the bank on account of the lease.

A letter was then introduced in evidence from John M. Graham to John W. Weeks, dated February 28, 1900, and marked "Exhibit I," and a copy of which is hereto annexed. The witness testified that this was the first notice that he had that Mr. Graham made any claim under the lease against him or the assets of the bank; that he had a conversation about this matter with Mr. Graham in March; that Mr. Graham said that he called to see him about the lease of the Broadway premises; that the witness said that was one of the matters he would have to settle as agent of the stockholders; that Mr. Graham said that the Broadway Bank had made a lease of those premises, and he believed the officers of he bank knew that he, Mr. Graham, was negotiating for the purchase of the property; that he, Mr. Graham, thought that was an unfriendly proceeding on their part; that while he, Mr. Graham, would be glad to accommodate the witness personally, he did not feel friendly on account of that action of the officers and stockholders of the Broadway Bank, and that he would be governed in his action accordingly; that Mr. Graham refused to cancel the lease; that the witness put the premises in the hands of Whitcomb, Wead & Company; that he received offers from Whitcomb, Wead & Company about the Beacon Trust Company, which he submitted to Mr. Graham; that in submitting such offer he said nothing about its being conditional on the old premises of the Beacon Trust Company being relet; that if Mr. Graham had accepted the Beacon Trust Company, he would have been willing to accept the liability of the Beacon Trust Company; that Mr. Graham did not see fit to accept this offer; that the rent offered was $4500, for the balance of the lease, for the banking rooms only; that at that time the rent had been paid in full, and there had been no loss; that at that time he sent the keys of the building to Mr. Graham, who received them. Prior to sending the keys he had the property belonging to the Broadway Bank removed by employés of the bank, and afterwards sold what he removed; that if Mr. Graham had accepted the offer of the Beacon Trust Company, he had a proposition from them to pay $300 for the
48 fixtures; that he was not clear whether this was reported to Mr. Graham; that later, when submitting the offer to Mr. Graham, which came from Whitcomb, Wead & Company, from the Massachusetts Title Insurance Company, Mr. Graham said that he wanted to consider it, or was doubtful about it, and among other things, said he rather questioned the financial responsibility of the company; that that was the proposition for $4500 in November,

1900, for the banking rooms; that Mr. Graham asked witness to get a financial statement of the company, and whether the witness knew of any sales of stock; that the witness took the precaution to go to the auction rooms, and he got a statement of returns of the Commissioner of Corporations; that he received a letter dated November 12, 1900, from Mr. Graham.

This letter was then introduced in evidence and marked "Defendant's Exhibit G," and a copy thereof is hereto annexed.

The witness then testified that he submitted to Mr. Graham a copy of the report made to the Commissioner of Corporations, and the letter of November 15, 1900, from the defendant to Mr. Graham, enclosing said copy, together with said copy were introduced in evidence by the defendant and marked respectively "Defendant's Exhibits B and C," of which copies are hereto annexed; that Mr. Graham decided the company was not of such financial standing that he wished to accept them as a tenant; that the witness told Mr. Graham that he did not think the decision was a reasonable one; that they were responsible and would make a suitable tenant; that the question of the witness's willingness to have Mr. Graham accept the Title Insurance Company as a tenant without Mr. Graham's waiving any claim against him did not come up; that witness would have been willing; that he wrote the letter of May 19, 1900, and the letter of March 5, 1901.

Both of these letters were introduced in evidence as lefendant's Exhibits K and L respectively, and copies are hereto attached; that within the so-called bank district he did not think the location of banks made any difference as to competition; that he heard what the other witnesses testified as to banks and trust companies being in similar location, and was familiar with those facts; that the present
49 First National Bank is a consolidation of the National Bank of the Redemption; that the quarters occupied by the First National Bank were not sufficient for their accommodation, and their present quarters are the only ones that have supplied sufficient room, and further than that the National Bank of the Redemption had a lease.

In addition to the correspondence hereinbefore referred to, the defendant put in evidence the following letters, namely, a letter to John M. Graham from defendant, dated November 9, 1900; a letter from John M. Graham to defendant, dated November 22, 1900; a letter from defendant to John M. Graham, dated November 26, 1900, which letters were marked "Defendant's Exhibits A, D and E respectively," and copies of the same are hereto annexed.

On cross-examination

The witness testified that in 1897, there was a consolidation of eleven banks and two banks went out of business; that more went out afterwards; that there had been a reduction of twenty-one or twenty-two national banks in ten years.

This was all the evidence in the case. At the close of the evidence the plaintiff requested the Court to instruct the jury as follows:

I. That upon the insolvency of the lessee Broadway National Bank the plaintiff was entitled to enter upon the premises and to repossess the same as of its former estate and at its discretion to relet the premises at the risk of the lessee bank, in which case the lessee bank would remain liable (under its covenant to that effect) for the residue of the term for the amount stipulated as rent in the lease, less such amounts as should be collected by the plaintiff for the rent or use and occupation of the premises or of any part thereof.

II. That in order to hold the lessee bank liable for the amount of the rent for the residue of the term under this covenant, it was not obligatory upon the plaintiff to notify the bank of its election so to do.

III. That in order to hold the lessee bank liable for the amount of the rent for the residue of the term under this covenant, it was not obligatory upon the plaintiff to relet the premises or to attempt to relet them.

The Court declined to give these instructions and instructed the jury as follows:

Charge to the Jury.

Mr. Foreman and Gentlemen: The reason that this case is brought before you is because it is understood from the face of the declaration that the case arises under the laws and the Constitution of the United States. Therefore, while the State Courts may for the most part take jurisdiction over causes of action arising under the statutes of the United States, nevertheless, the Federal Courts, Circuit and other Courts of the United States, are specially charged with jurisdiction over that class of cases. As it turns out, although, except for the Constitution and statutes of the United States, this case never could have arisen, and although the defendant acts under the statutes of the United States, yet as I have said, as it turns out, the questions which are really in issue between the parties, the questions submitted to you, are questions over which the State Courts have jurisdiction as well as we, and questions that depend upon the common law, that is the law which the State Courts recognize independently of the statutes of the United States. In other words, while the case could not exist, could never have been brought, while the relations of the parties before you never could have arisen except under the statutes of the United States, yet when we get together and find out what the real controversies are, the statutes of the United States have no relation between them. The same controversies might arise between a trust company created by the laws and a bank also created by the laws of Massachusetts.

Now, the issue which you have to pass on here is a single and very simple issue. I might very briefly submit that issue to you, but it is fair to you and it is for the interest of the community that explanations should be made to the jurors of the way in which controversies arise, and how they come here and why they are here, that you should not be required to pass on it simply as a speculative question

dislocated from all the surroundings of business of other life, but that it should be pointed out to you how it is that the controversy arose, and how it came about that the case is here.

You know, gentlemen, that national banks are organized under the laws of the United States and have no existence except by virtue of the statutes of the United States. Those statutes provide that when a national bank becomes insolvent, the Comptroller of the Currency, who represents an executive department at Washington, shall appoint a receiver who shall take charge of the affairs of the bank, collect its assets and distribute them among the creditors and close up everything which pertains to its business matters. That
51 receiver is an officer of the United States Government, and until the bank is closed he remains in possession of the assets as an official, and the stockholders have no more concern with it except to pay up the liabilities as stockholders, in the event it is found that the assets of the bank are not sufficient to discharge its liabilities. But, on the other hand, it would seem rather strange and rather hard that after the bank failed and is apparently insolvent, it turns out that there is enough to pay all its liabilities and something over, that the stockholders should not again resume possession of the bank and its affairs and wind up its assets and get all they can out of them for their own benefit and make their loss as small as possible. Therefore, the statutes of the United States were amended and it was provided, in substance, that after a bank goes into the hands of a receiver, if it appeared that the debts which had been proved, that is, allowed by the receiver as debts of the bank, had been paid, allowed by the receiver or otherwise established they had been paid, so far as the debts were ascertained, it also was apparent there was sufficient assets left to extinguish any possible liabilities which had not been ascertained, then the bank being efficient again, solvent, the law provides that it goes into the hands of the stockholders again, the receiver disappears, the bank as stockholders in one sense is resuscitated, the stockholders take hold of it and manage it for themselves and may for that purpose appoint an agent, the statute providing carefully how that agent shall be appointed. Now, Mr. Weeks is that agent. All the debts against this bank which have been ascertained and were known to the receiver were paid. Of course, it was known that a liability existed on this lease of some kind, but the Treasury Department being satisfied that the assets of the bank were sufficient to carry the lease in any contingency, they were satisfied to restore those assets to the custody and control of the shareholders and their agents. Now, the statute provides, before that is done, the shareholders of the bank shall execute and file a bond to the satisfaction of the Comptroller of the Currency, conditioned for the payment and discharge in full of every claim that might thereafter be proved against such association. In other words, bonds are given not by the agent as agent, but by the agent, Mr. Weeks in this case, given by him as shareholder, which
52 no other shareholder or any number of shareholders might give. That bond takes the place of the assets which came into the hands of the agent of the shareholders. It is purely a

voluntary affair and is presumed to be sufficiently protected by the agent of the shareholders. So long as the bank remains in the hands of the receiver just so long this plaintiff had a lien, so to speak, upon those assets. They remain in the hands of the official of the United States, and those assets in his hands were held to pay any judgment which the plaintiff in this case might obtain, and if the shareholders or any shareholder, Mr. Weeks or any one else, saw fit to take those assets as their own and give a bond in law therefor, he or they may be presumed to have sufficient assets to meet the liability which the bond covers. At any rate, the plaintiff would not be prejudiced, because before the bond was given or the agent appointed, the plaintiff has a right, if these assets were in the hands of the agent, to meet his claim, if one should be established. Therefore, it cannot be said that this is a claim between the plaintiff and the agent, because the position he occupies he occupies voluntarily, not as an individual or even as agent, but as a shareholder, interested in the working out of these assets for the most they would yield for the other shareholders, because coming in here ought not, either directly or indirectly by any kind of impression on your mind, make any difference in this case from what the case would be if the suit was brought against the receiver or against the parties.

I speak of these things not because I deem it necessary, but because I think it desirable to be truthful and in this case and all other cases you will approach the matters you have to decide in a strictly judicial spirit, applying to the solution all your good sense, remembering your oaths and understanding that so far as you are here, and while you are here, your obligation to proceed, on those rules, with those principles, in that spirit, is the same as my obligation under my oath to disregard any impression which I might receive, except those which the law provides that I should regard.

Now, when this bank failed, it was the holder of an interest in the banking room which it occupied and some other portion of the same building under this lease with the International Trust Company. The lease was not executed by the International Trust Company. It was executed by the persons as individuals who owned the
53 premises before the International Trust Company owned. But the law with reference to leases is somewhat peculiar, very disadvantageous in many respects. On an ordinary contract, the only parties who could bring a suit or could be sued were the persons who signed the contract, but upon a lease of real estate for most all purposes, indeed, for all purposes we have here, where the man who rents the real estate, sells it, especially rents it by written lease, then the person who rents or lets has all the rights of the owner and the purchaser and may bring suit in his own name. On the other hand, for many persons, the person who took the lease, as in this case, the Broadway Bank, may bring suits, establish his or its relation with the person or corporation who brought the real estate after the lease was made. So that for all the questions we have here before us, unless barely one question to which I may refer in the future, the relations of these parties are the same as though this lease had been made by the International Trust Company to the Broad-

way National Bank, or I may say, to Mr. Weeks, as agent of the Broadway National Bank. So that I may freely speak of the lessor and lessee without troubling you again with the fact that the title to the property changed after the lease was made.

Now, you know, gentlemen—and this is a fact which bears on this case in every aspect in which you have to regard it—you know that the relations of the lessor and lessee are peculiar in very many respects. The man who owns real estate and lets part of it to a tenant is bound, has a right in making that lease, to regard not only his personal interest but also the interest of the rest of the property, and that is true of all the relations which may afterwards arise between the parties wherein new action is required. The owner of property is entitled, and in justice to himself, and perhaps in justice to the neighborhood, to consider the effect of transactions which may or may not be made with reference to his own interest, especially his own interest as the owner of the balance of the property which is not leased. Well, now, in our smaller cities and towns our police ordinances are very simple. The relation between the inhabitants of a small city or town are simple and but few regulations are required, but when you get into a large city then the regulations which the necessities of the police require are more numerous,
54 more carefully drawn and more in detail and increase in all respects as the population of the city increases; and while in a very small city or town very few matters are to be looked after when a part of real estate is rented, yet when we come to a large city with large and valuable rights at stake, the regulations on the leases of a part of a building and the regulations thereto are rightly regulated and looked after with regard to the interests of the remaining property, more than they are in a place where the population is small and the buildings of a more moderate class. In dealing with real estate, the landlord is entitled to a large consideration with reference to the character of the tenants who shall enter upon a portion of the property, and that right must be considered, must be allowed for in all the aspect of this case. They not only must be looked after by you and me, gentlemen, in this case, but it has been carefully provided for in this lease, and provided for by clauses in the lease which would have been more stringent as against the defendant in this case, if the defendant had been allowed to remain in possession of the premises than they are in any view of the relations of the case as it stands before us.

The lease provides that "during the term of the lease the premises shall be used as the business offices of said corporation and for no other purposes." That is the Broadway National Bank. In other words, if the plaintiff had not taken possession of the property and allowed it to stay there, remain there, that is, as the case shows or is understood to show, sufficient assets in the bank, the hands of the agent of the stockholders to pay the rent, the rent would have been paid, the care and risk of the premises would have been on the defendant Weeks, as already said, and if the building could have been used to any purpose whatsoever, the Broadway Bank having disappeared, it certainly could not have been used except for banking

purposes, for the business of the Broadway Bank, for some national bank or for some business akin thereto.

Now, gentlemen, that is a fact which illustrates what I have said to you, the right and the duty of owners of property to restrict the uses to which it can be put, and no stringent restriction that I know of can be conceived than I find in this lease, a restriction voluntarily put in here by the parties themselves that this portion of the
55 premises while held under lease by the Broadway Bank should be used, not for its purposes, gentlemen, not for any purpose to which the Broadway Bank put it, but as the business office of the Broadway National Bank and for no other purpose. Well, now, while I am not prepared to say to you, and I have no occasion to say to you, that in view of the fact that the Broadway National Bank had ceased to have any active existence, the bank or its agent would have been obliged, if its agents had not interfered, had gone to sleep and left them alone, to have paid the rent and held the property vacant, because it would not be applied to the uses stipulated expressly for in the lease, yet I do say to you that is a matter which must color your consideration of this case throughout; that by the very terms of the lease and the relations of the parties this property was devoted during the terms of this lease, if not strictly to the occupancy of the Broadway National Bank, yet to an occupancy of the same character and class akin thereto; that is to say, for banking purposes, either by a banking corporation or by some concern that was doing a banking business, as ordinarily understood, and the International Trust Company, when it came to relet the property, had a right to consider that fact and take the benefit of that fact, and you may consider it when you come to pass upon this question and give it full effect in the spirit and in the way I point out to you.

Neither the Broadway National Bank nor its receiver nor the agent of the stockholders could apply these premises to any use inconsistent with the spirit of the provisions to which I have called your attention. Now, let us go a step farther. Not only did the lease contain that provision which was put in there, not by the International Trust Company, but by the persons who owned the property at the time, having regard, as we may assume, to the interest of the property and the nature of the business done on the street, about which I know nothing but of which you know everything,—but the lease also contained the usual provision that the "Broadway National Bank would not assign this lease nor underlet the whole or any part of the premises without permission in writing being first given by the lessor." "Would not assign this lease or underlet the whole or any part of the premises without permission in writing being first given by the lessor." That is not novel in this
56 lease. That you find in almost every lease, because you know that the owner of the building is entitled to know who his tenant is to be, entitled to be consulted as to the class of tenants who go into the building—a provision especially important, as I have already said to you, in large cities where the interests are complicated and the property extremely valuable and valuable interests

are every way at stake. Of course, so long as this bank was in the hands of a receiver who was an officer of the law, that clause did not apply. Because the law so far ameliorates the clause, that when a man's affairs get into the hands of his executor or administrator, or corporations, through misfortune, get into the hands of an officer of the law to wind up through insolvency, the law desiring to use every possible opportunity of increasing the assets to be administered, says that that clause does not apply. So that so long as the bank was in the hands of the receiver, the receiver, notwithstanding that clause, might dispose of this lease if he had found somebody who wanted it, but it would still have been subject to the provision to which I have called your attention—used for the business of the Broadway National Bank or something akin thereto. That provision could not be waived by anybody except the owner of the property, whether it was those who owned it when the lease was made, or the owners at the time when the litigation arose. The law could not waive that, although the law does waive in behalf of persons acting under authority of the law, and, by compulsion of circumstances, it does waive the clause prohibiting the assignment of a lease, except by the consent of the owner of the property. But the moment the shareholders took possession again, either while in possession as shareholders or through their agent as agent for them, that clause forbidding that the lease could be assigned, except with the consent of the owners of the property, came again into full force. So that when after the receiver doing nothing, having done nothing, after the agent of the shareholders was appointed and resumed possession of it, the position was this: The International Trust Company could prevent the receiver from assigning the lease, prevent the property being used if it was assigned, for any purpose except those I have pointed out to you, and all the trust company had to do was to go to sleep and let the agent of the stockholders pay his rent and
57 work out the chance for making the property useful in the best way he could under the circumstances.

I bring these matters to your attention carefully, gentlemen, because it is claimed here that the International Trust Company, with which we are dealing, was actuated by a spirit of hostility, and you are to determine whether or not the fact that the International Trust Company might have gone to sleep, and left the responsibility and property, the use of the property, in the way I have described to you, instead of doing what it did, throws any light on the position in this respect. Whether it does or not I do not say; it is entirely for you. But the International Trust Company, instead of leaving that property in the care and charge of the agent of the bank standing here for the stockholders with whatever responsibilities and expenditures such a condition of things might have required, and merely monthly collecting his rent from assets which the conditions we have before us entitle us to asume was sufficient to protect this rent, for some reason which is not explained, so far as I know,—you are to judge about that—took possession of the property and asumed a burden in that respect, which it was not required to assume in view of the lease which I pointed

out to you, and now it is claimed that having assumed that burden, having stepped into possession of property, it assumed the further responsibility of certain duties out of which the defendant claims an advantage could not have arisen, if this trust company had remained neutral and left the property where it was, and where it was when the bank went into insolvency. That proposition is true in the sense and in the way which I shall point out to you. But as I shall leave to you for your determination in a judicial spirit, applying your good sense, as I have said, under your oaths and your consciences as jurors, I am calling your attention as I go along so that I may not overlook them to certain matters of the kind which I called to your consideration, if you see fit to consider them in reaching your final conclusion. It is for you to say whether anything to which I have called attention will weigh with you, and how far it will weigh with you in the final conclusion which you will reach in passing on the questions which I shall submit to you. It is my duty to bring them to your attention.
58 It is for you and your duty to apply them or not apply them, and to give them so much or so little weight as on your oaths you think should be given them, and for your conclusion in that respect you are responsible to your own consciences, not to me or anyone else.

Now, gentlemen, we come to the pith of the case so far as you are concerned. The rules of law which govern you are as follows. The lease contained the following covenant: "If the lessee, which is the Broadway National Bank, shall neglect to perform any of the covenants declared in this instrument, shall be declared bankrupt or insolvent according to law"—the bank was declared insolvent when the receiver was appointed by the Comptroller of the Currency —"then the lessors while certain neglect or default continue, without further notice or demand may enter upon the premises to any part or the whole and repossess the same as in the former estate and expel the lessee, and thereupon the lessors may at their discretion relet the premises at the risk of the lessee, who shall remain for the residue of said term responsible for the rent herein reserved, and shall be credited with such amounts only as shall be by the lessors actually realized."

Now, the rules of law which we apply to that are first, the proposition that the owners of the property having entered into possession under certain provisions of the lease, which in this case they did, there is no dispute about it,—might then decide to terminate the contract, not merely the lease but the mutual obligations of the parties, so far as the future is concerned, for all purposes whatsoever,—might say we have taken possession of these premises, we recognize you no further, we will rebuild them, we will relet them, we will improve them, we will do with them what we please, we will be no further accountable to you and you no further accountable to us. In other words, they might have terminated the lease in the usual sense in which it is understood a lease is terminated. That the International Trust Company might have done. Or, it might, as said in the lease, relet the premises at the risk of the lessee, hold-

ing the lessor, that is Mr. Weeks here, as agent, responsible for whatever amounts they should not receive from the tenants to whom the premises were let from time to time. The corporation,
59 the International Trust Company, had a right to elect which of those things they would do. By the law with which we have to deal is that in order to make Mr. Weeks liable under this provision of the lease, the International Trust Company must, within a reasonable time after entering into possession, have made its election to relet and manifest that election by a reasonable attempt to do so.

Now, that is the first proposition with which we have to deal and upon that proposition, as well as upon the other proposition with which you have to deal, I must say to you gentlemen, that the burden is on the plaintiff. By the burden I mean take the evidence in the case, take what has transpired in your presence to which you have been permitted to listen or observe, if the reasonable probabilities, take the agreements of the parties and the counsel, take cognizance of all these things as commonly known in the community and of all things of which you are competent to take cognizance,—take all these things together and consider them carefully in the judicial spirit of which I have spoken, and if the result leaves a preponderance in your judgment in favor of the plaintiff, then that proposition is evidence in its favor. If, on the other hand, the preponderance of the evidence is in favor of the defendant, or if your mind can reach no conclusion, then that proposition is settled in favor of the defendant.

The burden of establishing this proposition that I have called your attention to rests on the plaintiff, and I will make the same remark and same definition, the same explanation with reference to the burden of the case as to the other propositions which I shall submit to you. Has the plaintiff sustained the burden with reference to the proposition I have read to you? If he has, you may go no further and the verdict will be for the plaintiff. If he has, you may consider other propositions which I shall submit to you as I reach them. Has the plaintiff satisfied you by a preponderance of the case that the lessor did, within a reasonable time, make his election to relet and manifested that election by a reasonable attempt to do so? Well, gentlemen, I must express to you frankly my views of the evidence upon that topic in this case, but I wish you first to understand again that while I express to you my views of the evidence on that topic, you are not bound to accept them. The questions all through
60 the case, while not complicated, are extensive. The position is a peculiar one, the location of the property peculiar, or may be so regarded as peculiar, at least, by reason of the fact that it is admitted to be on a street where property is valuable, where it is constructed for a certain class of business, where it is surrounded by other valuable buildings occupied by a particular class of business, more or less, for different classes of business where there may be more or less difficulty in getting tenants. The considerations are not numerous nor complicated, but they are of that character that the Court would not be justified in assuming to know them, understand their bearing; therefore, upon some things which the Court ordinarily would assume

to pass on, itself, it will omit any attempt to pass on them finally, but submit them to you, giving you upon some of them its impression, not in order to enable you to understand what the impression is, but leaving it to you, notwithstanding its impressions, to determine ultimately the questions involved, giving to the suggestions of the Court only such weight as you would give to counsel as far so you saw fit to give weight to their suggestions, bearing in mind, of course, that the Court is experienced in some things, while the Court admits that you have had experience in many things of which it is not supposed to have had practical experience. Ordinarily whether a thing is done in a reasonable time or not is determined by the Court. My inclination is more and more in that direction, but in this particular case, whether or not this corporation, the International Trust Company, did within a reasonable time make its election to relet and so forth, that is, whether what it did, it did within a reasonable time, if it made an election to relet, I submit to you what, under the circumstances, was a reasonable time. Also I submit to you the question whether or not it did elect to relet at the risk of the Broadway National Bank or its agent, and whether or not it manifest its intention to relet by an attempt so to do. All of that I submit to you. At the same time it is my duty to call to your attention the effect of the correspondence in this case, and to ask you in view of that correspondence, whether or not at and before the time that this controversy arose, the defendant Weeks did not understand and did not acquiesce in the proposition that the International Trust Company had done all those things which were required to be done by
61 the provision to which I called your attention. I do not say to you, and I wish you to distinctly understand, that those provisions which I read to you are not conclusive. I submit it to you for what it is worth, giving you my impressions about it and saying to you that in my judgment if you find as early as before this dispute arose, now more than four years ago, the parties to this controversy understood and admitted they understood the position as claimed now by the plaintiff, you should hesitate and should have clear evidence before you disturb, more than four years afterwards, the condition of facts as then apparently understood by both parties. Now, Mr. Weeks, under date of May 6, 1900, first gives this clause which I read to you. He says, "I did not understand that this clause enabled the lessors to occupy the premises or any part of them." Then he goes on and says that he tenders the International Trust Company a tenant, that is the Beacon Trust Company, at a rent of $4500 a year, and then he says that the Beacon Trust Company being rejected, "I claim of you that the rent should be credited with the sum of $6500 per annum and that I should receive from you $500 a year during the remainder of the term." That is the excess amount of rent he is entitled to receive,—$500 a year, the excess rent. And in reply to that, under date of May 18, 1900, the president of the International Trust Company replies and says that the understanding of Mr. Weeks is correct, that the International Trust Company intends to hold him for the rent during the term of the lease, subject to what they may receive by subletting.

Now, gentlemen, I instruct you as a matter of law that Mr. Weeks was not obliged to tender the International Trust Company the Beacon Trust Company as a tenant, unless the International Trust Company had elected to relet the property at the risk of the Broadway National Bank and had established a position in that respect in all the particulars to which I have called attention. And I instruct you also as a matter of law that unless the International Trust Company put itself in the position in which the rule required it to put itself before the correspondence took place,—unless it had elected within a reasonable time to sublet as the lease provided and had manifested its intention so to do in the way I pointed out to you and had done everything to put itself in the position as the owner of the
62 property, as I described to you so that it was entitled to make the claim on Mr. Weeks, Mr. Weeks would not be entitled to this $500 per annum. He could claim it only in view of the fact that he understood that the International Trust Company had put itself in the position that he was bound; Mr. Weeks could not claim the $500 unless he was entitled to the deficiency. The proposition of law is too plain to need elaboration. Nevertheless, it does not follow absolutely that because Mr. Weeks understood at that time in a certain way, or because Mr. Weeks made the claim at that time it was consistent with the position now taken here, that the case is disposed of for the benefit of the plaintiff on that particular point. It only goes to show what the mutal understanding of the parties was and it is for you, I having explained it, to satisfy yourselves whether or not, from the matter to which I have called your attention, the parties then understood on both sides that the International Trust Company had established its position on that particular point, and if they so understood it, you will disturb it except in view of some clear explanations to the contrary.

Now, passing by that point, we have a question which I shall submit to you in the light of what I have said to you without attempting to sum up the evidence bearing upon it. It is, perhaps, the main question in the case; it is, perhaps, the question over which the parties have made the principal contest here. Whether it is or not I shall submit it entire to you without any comments except those which I have already made, so far as they may bear upon it. If I should undertake to sum up the evidence, one way or the other, I should not do justice. I should put some elements in a way in which they may not appear to you. Occasionally the Court feels bound to submit some portion of the evidence, but with the able counsel to present the case to you, the Court is not called upon to do this thing nor would it be justified in so doing. The proposition which is submitted to you in this way is as follows: Assuming that the International Trust Company and assuming that the first proposition to which I have called your attention, then comes the proposition which also must be settled in its favor by the preponderance of the case as I have explained to you in order that you can render a verdict in its favor. Assuming that it had taken possession
63 of the premises under such circumstances that, in accordance with the terms of the lease, it had a right to sublet at the risk

of the Broadway National Bank or its agent in winding up its affairs, then, gentlemen, for the plaintiff you must find that it made honest and reasonable efforts to relet; that its efforts in that direction must be such, those which a reasonable land owner, under the circumstances,—that it must have made honest and reasonable attempts to relet and that its efforts must be those which a reasonable land owner would make under the circumstances. Of course, gentlemen, in considering that question you are entitled to consider whatever has been said by the counsel on one side or the other. Only one fact comes in here on which I ought to say something to you in order to save the rights of the parties. It is claimed by the defendant that in as much as the property was leased before the International Trust Company purchased or owned it, therefore, the International Trust Company in reletting the property had no right to consider its own interests arising from the fact that it was a trust company. I understand it is to be conceded that if the property had been consolidated, the ownership of the whole property had been in the International Trust Company when the lease was made so that the tenant knew the relation of the trust company as it then existed, that it would be entitled to its own interest in the particular way which had been pointed out here, that is, the question of competition or whatever the interest may have been. Of course, gentlemen, you will consider that so far as the International Trust Company had interests to other people in the building, so far as the interests would be affected by a restaurant or a tenant which would depreciate the property in the entire neighborhood, or anything of that kind, its own interests should be considered.

Now, you are not to exclude from the consideration in this case the special interests of the International Trust Company in the particular to which I refer, that is, in relation to the matter of competition or in respect to the good or ill effect of having a trust company, or, at least, a corporation called a trust company, whatever it may have been, within its own premises. I say to you, gentlemen, that you must consider that whichever way it bears. Consider what is the nature of the business of the Beacon Trust Company, its title or its name, with reference to the peculiar interests of the Inter-
64 national Trust Company, for two reasons. In the first place, you are entitled to consider whether the Beacon Trust Company comes within the character of tenants who alone are admissible to that building, that is to say, tenants who are doing practically the business of the Broadway National Bank or a business akin to it in the way I have explained. In the second place, we must take, for the purpose of determining this question, the relation of the International Trust Company as bearing on the question to be considered whether some period of time and that period of time, I instruct you, is the period of time when the International Trust Company was required to exercise its discretion, use its judgment,—using reasonable care and skill with reference to its business, and not the previous time. If we go back to the period when the lease was made for one purpose, we go back to it for all purposes. It was to exercise that judgment and use that care with reference to the time when the subletting was

concerned and it is entitled to whatever advantages which that period of time gave as well as subject to the disadvantages which might arise from it. We must take for this question one period of time or the other. We must not take one period of time for one set of purposes and take the other period so far as it might work for or against either of the parties to the controversy.

Undoubtedly, gentlemen, under the rules which I have given you, the International Trust Company was bound to use reasonable care, reasonable diligence, reasonable efforts to relet this property. Reasonable care, perhaps, covers it all. Reasonable care having regard to the just interests of all concerned. Many efforts have been made to define reasonable care, but none of them were adequate, none of them of a categorical kind. Reasonable care is your rule, your guide. That is what it all comes down to. Are you satisfied that the International Trust Company did use reasonable care to relet the premises? Are you satisfied that the preponderance of the case is that they used reasonable care? If you find that it did, you must return a verdict in its favor, and if you find that it did not use reasonable care, or if you find that it did not seasonably elect to relet the premises, or manifest its election, this is, finding that the defendant has satisfied you with the preponderance of the case on either of these
65 points, or that the plaintiffs have not satisfied you with the preponderance of the case on either of these issues, your verdict must be for the defendant. Reasonable care depends on the nature of the task imposed. Reasonable care in wheeling a wheelbarrow is not the most reasonable care in operating railroad trains. In the eyes of the law it is the same, but in practice it is not the same. Reasonable care in reletting the premises over here, and the question here in the eye of the law, is the same as reletting a piece of property of little value in the outskirts, but as a practical question, it may not be, and probably is not the same. It probably requires greater diligence, greater skill, greater judgment. Whatever was necessary of skill, of care or judgment, to enable this plaintiff to handle the question of reletting that property, that reasonably it was bound to bring to the case. If it does not satisfy you with the preponderance of the evidence that it brought all these things to the case, the verdict must be for the defendant. Mind you, I do not mean by that, as counsel had justly observed, infallible judgment or skill. The best judgment sometimes errs. The whole voice of mankind may be one way today, and tomorrow we may see that the whole voice of mankind may be mistaken. You must determine the question by the result. Of course, you are entitled to look at the result. The question is whether the bank and this trust company brought in the way that these questions are fairly understood by you, men of intelligence, reasonable skill, and reasonable care of reasonable men, and men of good judgment, to the consideration of these questions. If it did, then it is not responsible for the result, although it might have been unfortunate, and is entitled to recover, although the result might not have been what was to be expected, although it might bear hardly on the defendant.

I do not know of any other considerations that I can call to your

attention. There are some thing which might been called to your attention but the parties did not consider them, therefore I pass them by. You see that these two questions are first, has the defendant proved by reasonable preponderance of the evidence that it elected to relet the premises and seasonably manifested that election, and secondly, has it used reasonable care in subleting or reletting the property? Upon either of these topics if the plaintiff
66 has not satisfied you by the fair preponderance of the case, as I have explained to you, your verdict must be for the defendant. If upon both it has satisfied you, your verdict must be for the plaintiff. So far as I can understand, your verdict must be for the amount in the declaration. If by any chance your award should be for less, then you will get at the interest pro rata by the rule of three, which is not perhaps accurate but which is so nearly accurate that I understood the parties to assent to it; that is, interest may be computed in that way in the event, which I do not forsee, that you should allow the plaintiff an amount less than that in the sheets which will be passed to you, Mr. Foreman.

The jury returned a verdict for the defendant.

To the refusal of the Court to rule as requested the plaintiff duly excepted, and its exceptions were duly saved, and inasmuch as the matters referred to and the instructions and directions of the Honorable Court are objected to, and the rulings requested by the plaintiff and refused by the Court do not appear by the record or verdict, the plaintiff prays the Honorable Court to set its seal to this bill of exceptions, showing the separate matters in evidence and the rulings in court thereupon, and the rulings requested by the defendant and refused by the Court and the exceptions thereto.

By Its Attorneys, ROBERT M. MORSE,
W. M. RICHARDSON.

January 25, 1905.
Allowed.
W. L. PUTNAM, *Circuit Judge.*

PLAINTIFF'S EXHIBIT 7.

This Indenture, made this eleventh day of August in the year eighteen hundred and ninety eight, by and between Henry Parkman, J. Elliot Cabot, and William W. Vaughan, Trustees under the will of Mary H. Dwight; Henry Parkman, and J. Elliot Cabot, Trustees under the will of Anna C. L. Mills; Henry Parkman and William Nichols, Trustees under the will of Sophia D. Wells; Thornton K. Lothrop, Trustee under the will of Mary E. Parkman; Henry Parkman and Thomas L. Livermore, Trustees under the will of John Walter Wells; and Henry Parkman, Lessors; and the Broadway National Bank, a corporation organized under the laws of the United States, Lessee,
67 Witnesseth: That the said Lessors do hereby lease unto the said Lessee the following premises in the building, situated 39 Milk Street, in Boston, in the County of Suffolk and Commonwealth of Massachusetts, viz: The premises now occupied by said Bank, namely, the banking rooms on the first floor of said building and the

basement under the same, with the privileges and appurtenances to the same belonging, to be used as the business offices of said corporation, and for no other purpose.

To have and to hold the said leased premises unto the said Lessee and its successors for the term of ten (10) years from the first day of April, eighteen hundred and ninety-nine.

Yielding and paying (except only in case of fire or other casualty as hereinafter is mentioned) the sum of Six Thousand (6000) dollars yearly, by equal monthly payments of Five Hundred (500) dollars each, on the last day of each month during the said term, and at that rate for such further time as the said Lessee, or any other person or persons claiming under it, shall hold the said premises, or any part thereof; the first payment thereof to be made on the last day of April now next ensuing.

And the said Lessee for itself and its successors hereby covenants with the said Lessors, their representatives and assigns, that it or they will, during the said term, and for such further time as the said Lessee or any other person or persons claiming under it shall hold the said premises, or any part thereof, pay unto the Lessors, their representatives or assigns, the said rent upon the days hereinbefore appointed for the payment thereof (except only in case of fire or other casualty, as hereinafter mentioned); and also will keep all and singular the said premises in such repair as the same are in at the commencement of said term, or may be put in by the said Lessors or their representatives or assigns during the continuance thereof, reasonable use and wearing thereof, and damage by accidental fire or inevitable accidents only excepted; that it, or others having its estate in the premises, will not assign this lease, nor underlet the whole or any part of the said premises, without permission in writing being first given by the Lessors, nor make nor allow to be made any unlawful, improper or offensive use thereof; and further, that it will indemnify and save harmless the Lessors, and those having their estate in the premises, from all loss or damage occasioned by the negligent use, misuse or abuse in said building, of water, water fixtures, steam-heating apparatus, gas or gas fixtures, by the said Lessee, or by those having its estate in the premises, or by any person or persons claiming under them; and that no alterations or additions shall be made, during the term aforesaid, in or to the same, without the consent of the said Lessors, or those having their estate in the premises, being first obtained in writing, allowing thereof. And also that the said

Lessee and its successors will, at the end or other termination
68 of said term, peaceably yield up unto the said Lessors, or those having their estate therein, the leased premises, and all additions and improvements that may be made thereto, in as good order and condition, reasonable use and wear thereof, and damage by fire or other casualties excepted, as the same now are in, or may be put into; that the Lessee will not suffer any strip or waste of the premises, and will not drill or make any hole in the stone or brickwork, and will not drive nails, staples or screws into the plaster or woodwork; and also that the said leased premises, or any part thereof, shall not be occupied or used by the Lessee, or those holding under it, for any other purpose or business than that for which the same are hereby

leased, and which is expressed in this lease, without permission in writing first given by the Lessors; and also that the Lessee, or those holding under it, will not do or suffer any act which will increase the rate of insurance on said building or on property therein, or cause extra insurance to be required thereon, or invalidate any insurance thereon, or cause extra risk of fire in said building.

Provided always, and these presents are upon this condition, that if the said Lessee or its successors or assigns do or shall neglect or fail to perform and observe any or either of the covenants contained in this instrument, which on their part are to be performed, or if the said Lessee shall be declared bankrupt or insolvent according to law, or if any assignment be made of its property for the benefit of creditors, then, and in either of the said cases, the Lessors, or those having their estate in the said premises, lawfully may, immediately or at any time thereafter, and while such neglect or default continues, and without further notice or demand, enter into and upon the said premises, or any part thereof, in the name of the whole, and repossess the same as of their former estate, and expel the said Lessee and those claiming under it, and remove its effects (forcibly, if necessary), without being taken or deemed guilty of any manner of trespass, and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant; and thereupon the Lessors may, at their discretion, relet the premises, at the risk of the Lessee, who shall remain for the residue of said term responsible for the rent herein reserved, and shall be credited with such amounts only as shall be by the Lessors actually realized. Also, that in case the premises, or any part thereof, or any part of the building of which they form a part, shall, during said term, be destroyed or damaged by fire or other unavoidable casualty, so that the same shall be thereby rendered unfit for use and occupation, or shall be taken for a street or any public use,—in such case the rent hereinbefore reserved, or a just and proportionate part thereof, according to the nature and extent of the injury sustained, shall be suspended or abated until the said premises shall have been put in proper
69 condition for use and occupation by the said Lessors; or these presents shall thereby be determined and ended, at the election of the said Lessors or their representatives or assigns, without right or claim of the Lessee or its successors for damage by reason of such taking or termination.

In case of eviction of the Lessee, or in case of the termination of this lease by reason of fire or other cause, the Lessors may immediately recover of the Lessee the pro rata rent up to the time of such eviction or termination, irrespective of the periods herein prescribed for the payment of rent.

The Lessee agrees to pay, as they become due and payable, all bills for gas consumed on the premises hereby leased, and to reimburse the Lessors, on demand, for any and all sums of money which the Lessors may pay for gas consumed on said leased premises during the term of this ease. The Lessee shall not be liable to any extra charge for steam heat.

It is hereby expressly agreed that all merchandise, furniture and property of every kind, which may be on the premises during the

continuance of this lease, are to be at the sole risk and hazard of the Lessee, and that if the whole or any part thereof shall be destroyed or damaged by fire, water or otherwise, or by the use or abuse of water, or by the leakage or bursting of water pipes, in any part of the building, or in any other way or manner or from any other cause whatsoever, no part of said loss or damage is to be charged to or borne by the Lessors in any case whatever; and also that the Lessee will replace all glass broken or injured in said leased premises while it shall hold the same, with glass of the same quality as that which may be broken; and also keep in repair all water and other fixtures, and leave the same at the end of the term in perfect condition; and that the Lessors shall not be called upon or required to make any improvements, alterations or repairs on the premises.

The Lessors will cause the elevator in said building to be operated daily during such reasonable business hours as may be designated by them, except on Sundays and such days as may be generally observed as holidays, and except when the same shall be stopped by accident or for repars; but they assume no liability for any injury to person or property which may result from the operation of said elevator, and the Lessee covenants to make no claim at any time against the Lessors*rs* or their representatives for damages for such injury.

And the said Lessors covenant and agree with the said Lessee and its successors, that it or they paying the rent aforesaid, and performing the covenants herein contained, on its or their part to be paid and performed, shall peaceably hold and enjoy the said demised premises, without hindrance or interruption by the said Lessors or any persons claiming under them.

In witness whereof, the said Lessors have hereunto set their hands and common seal, and the said Lessee has caused these
70 presents to be executed in its name and behalf by Roswell C. Downer, its president, thereto duly authorized, and its corporate seal hereto affixed, the U. S. Revenue stamp, as required by law, having been duly affixed and cancelled, all on the day and year first above wrtten.

BROADWAY NATIONAL BANK. [SEAL.]

[STAMP.] By ROSWELL C. DOWNER, *President.* [SEAL.]

HENRY PARKMAN,
J. ELLIOT CABOT,
W. W. VAUGHAN,
Trustees under will of Mary H. Dwight.

HENRY PARKMAN,
J. ELLIOT CABOT,
Trustees under will of Anna C. L. Mills.

HENRY PARKMAN,
WILLIAM NICHOLS,
Trustees under will of Sophia D. Wells.

HENRY PARKMAN,
THOMAS L. LIVERMORE,
Trustees under will of John W. Wells.

THORNTON K. LOTHROP,
Trustee under will of Mary E. Parkman.

HENRY PARKMAN.

PLAINTIFF'S EXHIBIT No. 11.

BOSTON, MASS., *May* 31, 1901.

John W. Weeks, Agent, Broadway National Bank, in Account with International Trust Co.

To rent of Rooms 39/41 Milk St., Boston, $6000 per annum, May 19, 1900, to May 31, 1901, 12 Mo. 12 days		$6125 80
Paid by J. Metzner, Basement June 1, 1900, to May 31, 1901, 12 mo	$900 00	
Paid by J. H. Pray & Son, Corner basement, June 1-30, 1900, 1 mo.	100 00	
Paid by O. H. Leaver, Corner basement, July 1 to Dec. 23, 1900, 5 mo. 23 days	569 24	1569 24
		$4556 56
Interest to June 21, 1901		147 55
		$4704 11
Interest from June 21, '01, to Nov. 22, '04		964 34
		$5668 45

71 PLAINTIFF'S EXHIBIT 12.

BOSTON, *May* 16, 1900.

International Trust Co., John W. Graham, President, Boston, Mass.

DEAR SIR: I am informed that the International Trust Co. having, as the present owner of the real estate at 39 Milk Street, terminated by a re-entry the lease of the said property lately held by the Broadway National Bank, claims to hold the Broadway Bank responsible for the rent of said premises during the remainder of the term under the following clause in said lease, to wit:—

"and thereupon the lessors may at their discretion relet the premises at the risk of the lessee, who shall remain for the residue of said terms responsible for the rent herein reserved and shall be credited with such amounts only as shall be by the lessors actually realized."

I do not understand that this clause enables the lessors intentionally to keep the premises or any part of them vacant. As agent, therefore, for the stockholders of said Broadway National Bank and in confirmation of the offer made you through counsel and by myself orally, I hereby tender to you as tenant for that portion of said premises lately occupied by said Broadway National Bank as banking rooms, the Beacon Trust Co. of this City, at a rental of $4500 per year, for the remainder of the term limited by the said lease to said Broadway National Bank.

This sum, together with the rents you are already collecting from

tenants in the basement of said premises, amounts to $6500 per annum and I hereby claim that the account of said Broadway National Bank shall be credited with the sum of $6500 per annum from May 1 last, the date on which I offered you the Beacon Trust Co. as a tenant, and that I shall receive from you the sum of $500 per year during the remainder of said term.

I remain, very truly yours,

(Signed) JOHN W. WEEKS.

PLAINTIFF'S EXHIBIT 13.

BOSTON, MASS., *May* 18, 1900.

John W. Weeks, Esq., Agent, c/o Mass. National Bank, Boston.

DEAR SIR: We are in receipt of your favor of the 16th inst. in reference to the premises leased to the Broadway National Bank. You are right in assuming that we shall hold the bank responsible for the rent of the premises during the remainder of the term covered by the lease, but we shall, of course, credit against the rent whatever amounts we shall realize from reletting the premises.

72 We do not, however, accept your suggestion that the bank is entitled to any other credit. The lease clearly provides that any reletting of the premises is to be at the discretion of the lessors and of their successors in title, and as we have already advised you, we do not propose to let the banking rooms to the Beacon Trust Company. It may be proper in this connection to suggest to you that no distribution of the assets of the bank, now held by you as agent for the stockholders, should be made without adequate provision for meeting the liability of the bank under the lease.

Very truly yours,

(Signed) JOHN W. GRAHAM, *Pres't.*

A.

Hornblower & Weeks, Bankers & Brokers, 53 State Street.

BOSTON, *Nov.* 9, 1900.

John M. Graham, Esq., Pres. International Trust Co., 45 Milk St., City.

DEAR SIR: As reported to you during our conversation this afternoon, I have a proposition from the Mass. Title Insurance Co. to assume the lease of the Broadway National Bank for the balance of its term at an annual rental of $4500. I am informed that this company is financially responsible. Will you please give this matter your early attention.

Yours truly, JOHN W. WEEKS, *Agent.*

B.

The Massachusetts National Bank of Boston.

Nov 15TH, 1900.

John M. Graham, Esq., Pres't, International Trust Co., 45 Milk St., Boston, Mass.

DEAR SIR: I enclose herewith copy of a Certificate of Condition of the Massachusetts Title Insurance Co., which shows that they are obliged to maintain a guarantee fund of $120,000, which is under the supervision of the State Insurance Department.

Their statement shows that they have mortgages to that amount, and cash on hand equal to $122,000.

They have been tenants in the Devonshire Bldg. for nearly five years; and I understand from the managers of that building that they have paid their rent promptly, and that their reputation is that they are able to meet all of their obligations.

I do not find a late quotation of the stock of this Company.

Very truly yours, JOHN W. WEEKS, *Agent*

73

C.

Abstract of Certificate of Condition.

Name of Corporation—Mass'tts Title Ins. Co.
Where located, Boston.
When Certificate was filed, Feb. 28, 1900.
Date of Annual Meeting, or of Statement, Jan. 30, 1900.
President, Chas. S. Skinner.
Treasurer, J. Thomas Baldwin.
Majority of Directors, Hales W. Suter, J. Thomas Baldwin, Thomas Hills, Joseph L. Drew, John C. Haynes, William Trantwine, Charles S. Skinner.
Fixed Capital, $300,000.
Capital Paid in, $300,000.

ASSETS:		LIABILITIES:	
		Capital Stock . .	300,000 00
Real Estate		Debts	5,798 58
Land and Water Power	None	Reserves:	
Buildings		Balance Profit and Loss	10,277 77
Machinery		Reserve for Depreciation . . .	
Other Assets, viz:			
Cash and Debts receivable . . .	9,244 06		
Plant — consisting of schedules, completed titles, etc.			

Manufacturers, merchandise, material and stock in process . .	182,500 00	
Patent Rights . .		
Law Library . . .	2,157 50	
Guaranty Fund, consisting of mortgages & cash .	122,174 79	
Miscellaneous		
Balance Profit and Loss		
	316,076 35	316,076 35

74 D.

International Trust Company.

BOSTON, MASS., *Nov.* 22, 1900.

John W. Weeks, Esq., Agent, c/o Mass. National Bank, Boston.

DEAR SIR: Replying to your favor of the 15th inst. we beg to say that our people do not care to accept the lessee suggested by you.

Respectfully yours, JOHN M. GRAHAM, *Pt.*

E.

Broadway National Bank, Cor. Milk and Arch Streets.

BOSTON, *Nov. 26th*, 1900.

International Trust Company, John M. Graham, Esq., President, 45 Milk St., Boston, Mass.

DEAR SIR: Your letter of November 22nd, stating that your Company did not care to accept the Massachusetts Title Insurance Company as lessee for the premises formerly occupied by the Broadway National Bank, came duly to hand and contents noted.

I am very much surprised at your action in this matter. This is the second responsible tenant whom I have offered to you, since you took possession of the premises. Each one was ready and willing to take that portion of the premises formerly occupied by the Broadway Bank, and pay therefor a greater sum than the Broadway Bank was paying.

It seems to me that this action on your part is manifestly unfair, especially as you have notified me that you intend to hold the Broadway Bank responsible for any deficiency that there may be by reason of the non-renting of the premises formerly occupied by them; and I can only say that if in any way the Broadway Bank should be held legally responsible for the rent of those premises, I should hold you responsible to account to me as Agent of the Broadway Bank for the surplus which you should have received by accepting either

one of these tenants over and above the rental stipulated to have been paid for those premises by the Broadway National Bank.

I remain,
Yours very truly, JOHN W. WEEKS, *Agent.*

75 F.

Whitcomb, Wead & Co., Real Estate and Investment Brokers, No. 28 Devonshire Building.

BOSTON, *Ap'l* 27, 1900.

For value received, we hereby agree to take a lease of the following-described premises: street floor #39 Milk St. (premises formerly occupied by the Broadway Nat. Bk.).

For the term of eight (8) yrs. and eleven (11) months, commencing May 1, 1900, being the balance of the lease to Broadway National Bank.

Paying therefor forty-five hundred (4500) dollars per year in gold, or its equivalent, at its present standard in equal monthly payments.

The form of the lease to be the same as that of the lessors.

The above offer is made conditional on our being able to dispose of our present lease (to Mch. 31, 1901, at the rate of $3348.32 per year).

The lessor- agrees to heat the premises by means of the fixtures now therein.

The lessors guarantee that said lease shall give the lessee undisputable possession of the premises.

Lessee agrees to purchase the fixtures now in the premises, not including the safes, the time lock to be restored to vault door, and pay therefor the sum of $300.

BEACON TRUST CO., *Boston.*
JOHN A. GALE, *Pres't.*

G.

Beacon Trust Company, 16 State St.

BOSTON, *Sep.* 21, 1900.

Whitcomb, Wead & Co., 16 State Street, City.

GENTLEMEN: We hereby renew our offer to take the Broadway Bank rooms, Cor. Milk & Arch Sts. for the balance of their lease, which we understand is for about nine years at an annual rental of ($4500) forty-five hundred dollars. This offer to hold good for today only.

O. M. DENNETT, *Treas.*

76 I.

International Trust Company.

BOSTON, MASS., *Feb.* 28, 1900.

John W. Weeks, Esq., Agent, c/o Mass. National Bank, Boston.

DEAR SIR: We wrote you some time ago in regard to unsettled rent bill of premises 37 Milk St. and have your reply stating that you were awaiting confirmation of your appointment as agent. As another month is about closing, we desire to have the matter settled in some way and trust you will give the same your immediate attention.

We take this occasion to say that although the Broadway Nat'l Bank has violated the terms and conditions of the lease of said premises, it does not relieve them from obligation under said lease and that the liability thereunder should be borne in mind by those having in hand the settlement of the affairs of the Broadway Nat'l Bank.

Respectfully yours, JOHN M. GRAHAM, *Pt.*

J.

International Trust Company.

BOSTON, MASS., *Nov.* 12, 1900.

John W. Weeks, Esq., Agent, Broadway Nat'l Bank, 53 State St., Boston.

DEAR SIR: Your favor of the 9th inst. received and the same will have our attention. In the meantime will you kindly inform us what the last public quotation of the stock of the Massachusetts Title Insurance Co. is and of what the assets of said Company consist. Awaiting your advices, we are,

Respectfuly yours, JOHN M. GRAHAM, *Prest.*

K.

Broadway National Bank, Cor. Milk and Arch Streets.

BOSTON, *May* 19*th*, 1900.

John M. Graham, Esq., Pres't, International Trust Co., 45 Milk St., Boston, Mass.

DEAR SIR: I enclose herewith check for $524.20, to pay the rent on leased premises to the Broadway National Bank, to date.

I also send by bearer, keys to the Bank, having removed all the property belonging to the stockholders.

77 Having offered a responsible tenant to take the premises for the balance of the lease, we disclaim any liability for further rent; and shall, under the lease, claim the excess which might have been obtained from that tenant, over the amount which we are liable for.

Yours very truly, JOHN W. WEEKS, *Agent.*

L.

Broadway National Bank, Cor. Milk and Arch Streets.

BOSTON, *Mar. 5th*, 1901.

Mr. John M. Graham, President, International Trust Co., Boston, Mass.

DEAR SIR: Please excuse my delay in not writing you sooner; but as I have been very busy the matter slipped my mind.

In relation to the claim which you make upon me as stockholders' agent of the Broadway Bank, I can only say that I cannot see how you have any valid claim in any way upon me or upon the Broadway Bank. If there is any ground for legal claim, I ought equitably to be entitled to compensation from you for the surplus rent which you would have received had you accepted either one of the tenants whom I sent to you.

There is no question but that you could have rented the property, if you had so desired, to good tenants, for rent larger than that paid by the Broadway Bank under its lease; and inasmuch as you entered and took possession of the premises, I fail to see how you can have any claim in relation to the matter. If you think you have, I wish you would have your attorney proceed and commence suit to decide the matter, as certainly I should not pay anything unless ordered to do so by the Court.

I remain, very truly yours, JOHN W. WEEKS, *Agt.*
Per C.

Also on the twenty-fifth day of January, A. D. 1905, the following Judgment is entered:—

Judgment.

January 25, 1905.

It is thereupon considered by the Court, to wit, January 25, 1905, the Honorable William L. Putnam, Circuit Judge, sitting,
78 that the said International Trust Company, plaintiff, take nothing by its said writ and that the said John W. Weeks, agent, defendant, recover of the said plaintiff his costs of suit taxed at ———.

A true record:
Attest: ALEX. H. TROWBRIDGE, *Clerk.*

Opinion of the Circuit Court.

December 27, 1904.

PUTNAM, *J.:*

In each of these suits there was a verdict for the defendant, and the plaintiff seasonably moved for a new trial because the verdict

was against the evidence, the weight of the evidence and the instructions of the court. A motion of this character does not necessarily operate as a waiver of an exception to a refusal of the court to peremptorily instruct the jury to render a verdict, especially under the second paragraph of Rule 15. The first of these cases was previously tried, with the result that a verdict was directed for the plaintiff. This verdict, and the judgment based thereon, were set aside by the Circuit Court of Appeals in accordance with an opinion passed down on October 6, 1903, and reported under the title of *Weeks v. International Trust Company*, 125 Fed. Rep. 370. In order that the present position may be understood, it is necessary to refer to that opinion in connection with the record of the previous trial.

At the previous trial, after disposing of the various questions which raised pure issues of law, and with reference to which the Circuit Court of Appeals agreed with the Circuit Court, the latter court came to the class of questions involved in the verdicts which the plaintiff now moves to set aside. We observed that the defendant claimed that the clause in the lease which is in question here, imposed upon the plaintiff "a certain duty to use reasonable efforts to rent the property". We ruled that that is not the proper construction of the lease, and that, by force thereof, the International Trust Company did not assume any risk, although it was required to use its discretion "with some degree of reasonableness and with some degree of justice, and have some regard to the rights of the position of the other parties concerned"; so that the defend-
79 ant might "show that the plaintiff had abused its discretion, that it had proceeded with a certain degree of wilfulness". We thereupon proceeded as follows:—

"Now, I find no evidence of that. I find, on sifting out the testimony, only three tenants actually brought to the International Trust Company in such a form as would present to it a fair question for solution. The first was the Beacon Trust Company, which it was clearly justified, and correct, in disregarding; the second was the Title Insurance Company, as to which, under the circumstances, it was justified in using its discretion. Whether or not its conclusion was correct, it was a case which it had a right to solve according to its own discretion. The same with reference to the tailoring establishment."

At that trial, no proposition was brought to the attention of the court to the effect that the plaintiff had not elected to relet at the risk of the defendant according to the terms of the lease. If it had been, their correspondence would have been accepted by us as establishing the fact that both parties had come to a common understanding that such election had been made, and this to such an extent that the defendant was claiming the benefit of the election in the event the plaintiff should receive rent in excess of that reserved in the lease. It is true that, among the twenty-one requests for instructions submitted to the court in connection with its charge to the jury, there were some whose phraseology was sufficiently general to include a proposition of that character; but, in view of the large number of requests, some of which were specific, and raised specif-

ically the precise proposition in behalf of the defendant, which we then stated, we were not bound to take notice of the more general requests, covering, perhaps, matters which we could, or could not, fathom without assistance. This was directly held by the Circuit Court of Appeals for this Circuit to apply to assignments of error in *United States v. Brown, Durrell & Co.*, 127 Fed. Rep. 793, 796; and the reasons therefor apply with equal force to requests for instructions to the jury, unless the courts are willing to admit that such requests may be used for the purpose of setting traps, rather than for bringing clearly to the attention of the presiding judge the points which the parties intend to raise.

When the question of sustaining the verdict given at the first trial came before the Circuit Court of Appeals, the issues seem, in
80 some way to have shifted. In its opinion, at page 375, the then position of the plaintiff, as there stated, was, "that it was entitled to recover even though it had wilfully and even maliciously refused to let the premises." This was not the ruling of the Court below in this behalf. On page 376, speaking of the right of re-entry, the opinion says:

"He," that is, the landlord, "may re-enter and may exercise discretion to relet the premises at the risk of the lessee. The exercise of this discretion is manifested by reletting or by an attempt to relet."

Further down on the same page the opinion says:

"We go further and hold that, in order to make the lessee liable under this covenant, the lessor must, within a reasonable time, make his election to relet, and must manifest that election by a reasonable attempt to do so."

The fair interpretation to be put upon these expressions is that the discretion to relet at the risk of the lessee can be manifested only by reasonable attempts to relet after an entry. It necessarily follows that this is the first step which the plaintiff in these suits was compelled to take in order to entitle itself to verdicts, although the plaintiff had rendered monthly statements to the defendant claiming the monthly rent, with credits of the amounts which had been in fact received from a subtenant of a part of the premises. Although the parties had entered into a correspondence clearly showing that each of them assented to the proposition that the plaintiff had entered and had elected to relet at the risk of the lessee, and this to such an extent that the defendant, standing as lessee, claimed the excess which might come from the receipt of surplus rent over that reserved in the lease, yet, as we now understand the rules which govern us, all this only goes in with other circumstances bearing on the question whether plaintiff had made a reasonable attempt to relet, without which all claims that it had exercised its discretion to relet at the risk of the lessee pass for nothing.

It was necessary that we should deal carefully with this proposition, especially in view of what the opinion further says on the same page, as follows:

"Not every proposed tenant need be accepted, but an unreasonable

refusal to accept a suitable tenant will be deemed an abandonment of the election to relet at the risk of the lessee."

81 This would clearly give to the possible course of action of the plaintiff, under some circumstances, a retroactive effect. In view of the fact that the circumstances made it plain that the International Trust Company, whatever its efforts, could not probably have relet the premises immediately, and in view of the further fact that their condition when vacated by the lessee was such that a considerable lapse of time would certainly be required before they could be put in order, and inasmuch, also, as no claim was made that the International Trust Company had not used reasonable diligence to sublet the basement, yet it had been subjected to inevitable intervals of vacancy, the court was induced to inquire whether the parties rested the cases on a claim of the whole or none. It received in response nothing which would have justified it in directing the jury that there was any question of a verdict for any part of the entire amounts claimed. The court does not know, of course, the views of the parties but it assumes that this silence grew out of the expressions which we have cited from the opinion, to the effect that, whatever might have been the early manifestation on the part of the plaintiff with reference to exercising its discretion, its subsequent conduct might have been held as an abandonment of the election to relet at the risk of the lessee.

On this, and on the whole case, we instructed the jury that the burden rested on the plaintiff; and this particular proposition was then put as follows:

"But the law with which we have to deal is that, in order to make Mr. Weeks liable under this provision of the lease, the International Trust Company must, within a reasonable time after entering into possession, have made its election to relet, and manifested that election by a reasonable attempt to do so."

This was amplified in a manner of which we are not advised the parties complain. In this connection reference was made to correspondence between the parties. Yet the jury were cautioned that this was not conclusive on this issue, and that is was submitted to them for what it was worth, having in mind the fact that it might be accepted by them as an admission on the part of the defendant that, to the time when it occurred, the plaintiff had complied with the terms of the lease in the respects pointed out by the citations already made from the opinion of the Circuit Court of Appeals. If, in

82 any particular, so far as we have gone, we misunderstood the position of the Circuit Court of Appeals, or the law, we are satisfied that the requests for instructions to the jury, which were made by the plaintiff, and were refused, will fully protect its rights.

So far, however, what we have said is rather explanatory, with a view of making clear to the parties the position taken with reference to what follows. This did not clean up all the propositions which, by the instructions of the Circuit Court of Appeals, we were bound to submit to the jury in some proper form. What remains renders it unnecessary that we should speculate on any question whether the jury came to a proper conclusion in regard to any proposition which

we have already detailed, for reasons which will make themselves apparent as we proceed. The Circuit Court of Appeals, in its opinion, at page 376, not only made the statement we have already referred to, that an unreasonable refusal to accept a suitable tenant would be deemed an abandonment of an election to relet at the risk of the lessee, but it also said, on the same page:

"If an honest and reasonable attempt to relet is made without success, then also the lessee is liable; the lessor need not go through the form of reletting."

Putting together all that the Circuit Court of Appeals said in its opinion, in connection with the fact that the parties at the trial demanded no issue but one involving the whole or none, it seemed to us plain that, in order that the plaintiff should recover, it was unnecessary for it to show that it had made reasonable efforts to relet. Therefore, that became the only practical issue of fact. We, therefore, submitted that issue directly to the jury, instead of submitting it in the precise form suggested by the language of the Circuit Court of Appeals with reference to what might operate as an abandonment of the election to relet. On this issue we directed the jury as follows:

"Assuming it," meaning the International Trust Company, "had taken possession of the premises under such circumstances that, in accordance with the terms of the lease, it had a right to sublet at the risk of the Broadway National Bank, or its agent, then, in order to find for the plaintiff, you must find that it made honest and reasonable efforts to relet; that its efforts in that direction were those which a reasonable landlord would make under the circumstances."

This, of course, was somewhat amplified and explained in a
83 manner as to which no complaint was made, and this was in substantial effect the whole issue which went to the jury; because, as we have explained, under the rulings of the Circuit Court of Appeals, as a whole, unless the plaintiff showed that it had made, and had continued to make, reasonable and honest efforts to relet, no verdict could be rendered in its favor under the special circumstances to which we have called attention. Therefore, we repeat that, on this motion, we have no occasion to consider any proposition except so far as it bears on that particular issue.

Now, it is said by the plaintiff, and justly so, that at the present trial no evidence was produced with reference to proposed tenants, specifically named, additional to what appeared at the first one. It further says that our rulings at the first trial with reference to the evidence then produced, including that as to the Beacon Trust Company, the Title Insurance Company, and the tailoring establishment, were not challenged by the Circuit Court of Appeals. This is undoubtedly true in a literal sense of the expression, because, excepting only, perhaps, as to the Beacon Trust Company, the Circuit Court of Appeals completely cut out the foundation of the principal rule which this court applied at the first trial. Therefore, what the court then said with reference to various proposed tenants became mostly irrelevant. At the first trial the court, in these expressions, was speaking in view of the rules then laid down, namely, that the plaintiff assumed no risk with regard to using reasonable efforts to rent

the property, but that, nevertheless, it could not abuse its discretion or proceed with any degree of wilfulness. Under the rule given by the Circuit Court of Appeals, the case entirely changed as to these particulars. It then remained to be determined whether the only objection which the International Trust Company made to the Title Insurance Company, for example, even though honestly made, namely, the objection in regard to its future probable solvency, was a reasonable one, in view also of the fact that the plaintiff was standing on the claim that the defendant was responsible for whatever the plaintiff did not, in fact, collect from new tenants. Such a question of reasonableness was clearly for the jury. Moreover, although, on the one hand, it was apparent that, for special reasons existing
84 when the International Trust Company took possession of the premises, and ever since, it was, and has been, difficult to secure for the particular property in question a tenant of the class which the International Trust Company was entitled to select, yet, on the other hand, there was a claim on the part of the defendant that, at least after the first few months of the period in dispute, there was, and had been, a lack of such efforts and diligence on the part of the International Trust Company as might properly be expected from parties having valuable premises to rent, which claim had so much color that we could not take it from the tribunal appointed by the Constitution for the trial of questions of fact.

When we submitted the cases to the jury, we certainly would not have done so unless we had then believed that it was in such a condition that we would not be justified in setting aside verdicts if rendered for the defendant. Nevertheless, being aware that the court cannot always follow with absolute care the details of the evidence and proceedings as a trial goes on, and that, consequently, the impressions which it has at the close of trial are frequently crude, we deemed it proper to review these verdicts on these motions; but we have not been able to find anything to justify us in modifying the impressions which we previously entertained.

In No. 1173*a*, *Ordered: Plaintiff's motion for a new trial, filed on December* 14, 1904, *is denied.*

In No. 1317, *Ordered: Plaintiff's motion for a new trial, filed December* 14, 1904, *is denied; and reference is had to the opinion filed on a like motion for a new trial in International Trust Company v. Weeks,* No. 1173*a*.

Petition for Writ of Error.

[Filed January 31, 1905.]

Your petitioner, the International Trust Company, the plaintiff in the above-entitled action, respectfully shows that said action was tried before the Honorable William L. Putnam, Circuit Judge, and a jury, at the term of the Circuit Court commencing October 15, 1904, and that a verdict was thereupon rendered against your petitioner, and judgment entered thereon in favor of the defendant and against your petitioner, as appears from the record in said action. That in the

course of said trial your petitioner took certain exceptions to
85 the refusal of said court to make certain rulings, as more fully appears from the bill of exceptions which has been filed and allowed in said action. That your petitioner respectfully insists that there was error in the refusal of the Court to make said rulings, as more fully appears from the assignment of errors which your petitioner files with this petition.

Whereupon your petitioner prays the allowance of a writ of error returnable to the Circuit Court of Appeals for the First Circuit.

By its Attorneys, ROBERT M. MORSE.
WM. M. RICHARDSON.

Assignment of Errors.

[Filed January 31, 1905.]

And now comes the plaintiff in the above-entitled action and files with its petition for writ of error this its assignment of errors, and thereupon says that there is manifest error in the record and proceedings in said action in the following particulars, to wit: that the Court erred in refusing to rule,—

1. That, upon the insolvency of the lessee Broadway National Bank, the plaintiff was entitled to enter upon the premises and to repossess the same as of its former estate and at its discretion to relet the premises at the risk of the lessee bank, in which case the lessee bank would remain liable (under its covenant to that effect) for the residue of the term for the amount stipulated as rent in the lease, less such amounts as should be collected by the plaintiff for the rent or use and occupation of the premises or of any part thereof.

2. That in order to hold the lessee bank liable for the amount of the rent for the residue of the term under said covenant, it was not obligatory upon the plaintiff to notify the bank of its election so to do.

3. That in order to hold the lessee bank liable for the amount of the rent for the residue of the term under said covenant, it was not obligatory upon the plaintiff to relet the premises or to attempt to relet them.

By its Attorneys, ROBERT M. MORSE.
WM. M. RICHARDSON.

86 *Bond on Writ of Error to Circuit Court.*

[Filed and Approved January 31, 1905.]

Know all men by these presents, That we, the International Trust Company, of Boston, in the Commonwealth and District of Massachusetts, as principal, and John M. Graham, of said Boston, and Henry L. Jewett, of Newton, in the county of Middlesex and said Commonwealth, as sureties, are held and firmly bound unto John M. Weeks, of Newton, in the county of Middlesex and said Common-

wealth, in the full and just sum of two hundred dollars, to be paid to the said John W. Weeks, or his certain attorney, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this twenty-seventh day of January, in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a Circuit Court of the United States for the District of Massachusetts in a suit depending in said court, between said International Trust Company, plaintiff, and said John W. Weeks, as stockholders' agent of the Broadway National Bank, defendant, judgment was rendered against the said International Trust Company, and the said International Trust Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said John W. Weeks, citing and admonishing him to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the twenty-eighth day of February, A. D. 1905.

Now, the condition of the above obligation is such, that if the said International Trust Company shall prosecute is writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

INTERNATIONAL TRUST COMPANY, [SEAL.]
H. L. JEWETT, *Secretary.*
JOHN M. GRAHAM. [SEAL.]
HENRY L. JEWETT. [SEAL.]

Approved:
W. L. PUTNAM,
Circuit Judge.
January 31, 1905.

The above bond is satisfactory to us.
CARVER & BLODGETT,
Attorneys for John W. Weeks.

87 Citation on Writ of Error to Circuit Court

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to John W. Weeks, of Boston, in the District of Massachusetts, agent of the shareholders of the Broadway National Bank, a banking association established under the laws of the United States, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the twenty-eighth day of February next, pursuant to a Writ of Error filed in the clerk's office of the Circuit Court of the United States for the District of Massachusetts, wherein the International Trust Company, a corporation duly estab-

lished under the laws of the Commonwealth of Massachusetts, and having its usual place of business in Boston, in said District of Massachusetts, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William L. Putnam, judge of the Circuit Court of the United States for the District of Massachusetts, this thirty-first day of January, in the year of our Lord one thousand nine hundred and five.

W. L. PUTNAM,
U. S. Circuit Judge.

Acknowledgment of Service on Citation.

FEBRUARY 9, 1905.

Service of the within writ is hereby accepted.

CARVER & BLODGETT,
Attorneys for John W. Weeks.

Clerk's Certificate.

UNITED STATES OF AMERICA, *District of Massachusetts, ss:*

I, Alexander H. Trowbridge, Clerk of the Circuit Court of the United States for the District of Massachusetts, within the First Circuit, certify that the foregoing is a true copy of the record in the cause entitled,

88 No. 1173a, Law Docket,

INTERNATIONAL TRUST COMPANY, Plaintiff,
v.
JOHN W. WEEKS, Agent, Defendant,

in said Circuit Court determined, the Opinion of the Circuit Court of December 27, 1904, the Plaintiff's Petition for Writ of Error, the Assignment of Errors and the Bond on Writ of Error, and also the original Citation upon the Writ of Error issued in said ca e, with the Acknowledgment of Service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said Circuit Court, at Boston, in said District, this twentieth day of February, A. D. 1905.

[SEAL.] ALEX. H. TROWBRIDGE, *Clerk.*

89 & 90 United States Circuit Court of Appeals for the First Circuit, October Term, 1904.

No. 572.

INTERNATIONAL TRUST COMPANY, Plaintiff, Plaintiff in Error,
v.
JOHN W. WEEKS, Agent, Defendant, Defendant in Error.

Error to the Circuit Court of the United States for the District of Massachusetts.

Before Colt, Lowell, and Brown, JJ.

Opinion of the Circuit Court of Appeals.

May 10, 1905.

Per Curiam.

We find no substantial question presented by the record in this case which was not disposed of by our opinion passed down October 6, 1903, in Weeks *v.* International Trust Company, 125 Fed. Rep. 370. The third assignment of error raises again the question there decided. No error is shown by the first and second assignments, as the law bearing on the subject was sufficiently and correctly stated by the learned judge in his charge.

The judgment of the Circuit Court is affirmed, and the defendant in error recovers costs in this court.

A true copy:
Attest: JOHN G. STETSON, *Clerk.*

91 & 92 United States Circuit Court of Appeals for the First Circuit, October Term, 1904.

No. 572.

INTERNATIONAL TRUST COMPANY, Plaintiff, Plaintiff in Error,
v.
JOHN W. WEEKS, Agent, Defendant, Defendant in Error.

Error to the Circuit Court of the United States for the District of Massachusetts.

Judgment in Circuit Court of Appeals.

May 10, 1905.

This cause came on to be heard (being submitted on briefs) May 1, 1905, on the transcript of record from the Circuit Court for the District of Massachusetts,

On consideration whereof, It is now, to wit, May 10, 1905, ordered, adjudged and decreed by this court as follows:

The judgment of the Circuit Court is affirmed, and the defendant in error recovers costs in this court.

By the Court.

JOHN G. STETSON, *Clerk.*

A true copy:
Attest: JOHN G. STETSON, *Clerk.*

93 & 94 United States Circuit Court of Appeals for the First Circuit.

INTERNATIONAL TRUST COMPANY, Plaintiff in Error,
v.
JOHN W. WEEKS, Defendant in Error, Shareholders' Agent of the Broadway National Bank.

Petition for Writ of Error.

Filed May 18, 1905.

Your petitioner, the International Trust Company, plaintiff in error in the above-entitled cause, respectfully shows that said cause is now pending in the United States Circuit Court of Appeals for the First Circuit and that a judgment was entered therein on the 10th day of May 1905 affirming a judgment for the defendant in the Circuit Court of the United States for the District of Massachusetts; that the matter in controversy exceeds one thousand dollars besides costs, and the jurisdiction of none of the courts above mentioned is or was dependent in any wise upon the opposite parties to the controversy being aliens and citizens of the United States or citizens of the different states, and that this cause does not arise under the Patent Laws, nor the Revenue Laws, nor the Criminal Laws and that it is not an Admiralty cause, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error, and therefore your petitioner prays that a writ of error may be allowed it in the above-entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the First Circuit to send the record and proceedings in said cause, with all things concerning the same to the Supreme Court of the United States, in order that the errors complained of in the assignments of error herewith filed by said plaintiff in error, may be reviewed and if error be found, corrected according to the laws and customs of the United States.

INTERNATIONAL TRUST COMPANY,
By its Attorneys, ROBERT M. MORSE AND
WILLIAM M. RICHARDSON.

95 United States Circuit Court of Appeals for the First Circuit.

INTERNATIONAL TRUST COMPANY, Plaintiff in Error,
v.
JOHN W. WEEKS, Defendant in Error, Shareholders' Agent of the Broadway National Bank.

Assignment of Errors.

Filed May 18, 1905.

The plaintiff in error, in the above-entitled cause, files with its petition for writ of error this its assignment of errors and thereupon says that in the record and proceedings aforesaid there is a manifest error in the following particulars, to wit:—

1. That said United States Circuit Court of Appeals erred in refusing to rule that upon the insolvency of the lessee, Broadway National Bank, the plaintiff was entitled to enter upon the premises and to repossess the same as of its former estate and at its discretion to relet the premises at the risk of the lessee bank, in which case the lessee bank would remain liable (under its covenant to that effect) for the residue of the term for the amounts stipulated as rent in the lease, less such amounts as should be collected by the plaintiff for the rent or use and occupation of the premises, or any part thereof.

2. In refusing to rule, that in order to hold the lessee bank liable for the amount of the rent for the residue of the term under said covenant it was not obligatory upon the plaintiff to notify the defendant of its election so to do.

3. In refusing to rule that in order to hold the lessee bank liable for the amount of the rent for the residue of the term under said covenant it was not obligatory upon the plaintiff to relet the premises or to attempt to relet them.

4. In ruling that in order to make the lessee liable under the covenant of the lease referred to, the lessor must within a reasonable time make its election to relet and must manifest that election by a reasonable attempt to do so.

5. In ruling that the evidence was sufficient to warrant a jury in finding that the plaintiff in error did not elect its remedy of reletting the premises.

96 6. In not ruling that the judgment of the Circuit Court of the United States should be reversed.

7. In ruling that the judgment of the Circuit Court of the United States should be affirmed.

INTERNATIONAL TRUST COMPANY,
By ROBERT M. MORSE AND
WILLIAM M. RICHARDSON,
Its Attorneys.

97 & 98 Certificate of Clerk of Circuit Court of Appeals.

Certificate of Clerk of United States Circuit Court of Appeals for the First Circuit.

I, John G. Stetson, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the foregoing pages, 3 to 96, inclusive, contain and are a true copy of the record and all proceedings in the cause entitled,

No. 572.

INTERNATIONAL TRUST COMPANY, Plaintiff, Plaintiff in Error,
v.
JOHN W. WEEKS, Agent, Defendant, Defendant in Error,

in said United States Circuit Court of Appeals for the First Circuit determined.

I further certify that annexed hereto are a copy of the bond approved by Hon. Le Baron B. Colt, Senior Circuit Judge for the First Judicial Circuit at the time of allowing the writ of error issued in said cause to said United States Circuit Court of Appeals for the First Circuit, and the original citation upon said writ of error, with an acknowledgment of service thereon.

In testimony whereof I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals, at Boston, in the First Judicial Circuit, this twenty-ninth day of May, A. D. 1905.

[Seal United States Circuit Court of Appeals, First Circuit.]

JOHN C. STETSON, *Clerk.*

99 & 100 (Copy.)

Know all Men by these Presents, That we, International Trust Company, as principal, and John M. Graham of Boston Henry L. Jewett of Newton, as sureties, are held and firmly bound unto John W. Weeks, Agent of the shareholders of the Broadway National Bank, in the full and just sum of Five hundred ($500.00) dollars, to be paid to the said John W. Weeks, Agent &c., his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of May, in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a United States Circuit Court of Appeals for the First Circuit in a suit depending in said Court, between International Trust Company, plaintiff in error, and John W. Weeks, Agent of the shareholders of the Broadway National Bank, defendant in error, a judgment was rendered against the said plaintiff in error and the said plaintiff in error having obtained a writ of error and filed a

copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant in error citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said plaintiff in error shall prosecute said writ to effect, and answer all damages and costs if it fail to make plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN M. GRAHAM. [SEAL.]
HENRY L. JEWETT. [SEAL.]

Approved by—
LE BARON B. COLT,
Senior Circuit Judge, First Judicial Circuit.

101 Original Citation on Writ of Error to Circuit Court of Appeals.

UNITED STATES OF AMERICA, *ss:*

To John W. Weeks, Agent of the shareholders of the Broadway National Bank, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States Circuit Court of Appeals for the First Circuit wherein International Trust Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Le Baron B. Colt, Senior Circuit Judge for the First Judicial Circuit, this twenty-fourth day of May, in the year of our Lord one thousand nine hundred and five.

LE BARON B. COLT,
Senior Circuit Judge, First Judicial Circuit.

Due and sufficient service of the within citation is acknowledged this 25th day of May, 1905.

CARVER & BLODGETT,
Attorneys for Defendant in Error.

Endorsed on cover: File No. 19,784. U. S. Circuit Court Appeals, 1st Circuit. Term No. 282. International Trust Company, Plaintiff in Error, *vs.* John W. Weeks, Agent of the Shareholders of the Broadway National Bank. Filed May 31st, 1905. File No. 19,784.

FILE COPY.

Supreme Court U.S.
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ALBERT H. GILCHRIST, Cl.

No. 31.

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 282.

INTERNATIONAL TRUST COMPANY,

PLAINTIFF IN ERROR,

v.

JOHN W. WEEKS, Agent of the Shareholders of the Broadway National Bank,

DEFENDANT IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for Plaintiff in Error.

ADDISON C. GILCHRIST & SON, LAW PRINTERS, BOSTON, MASS.

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 282.

INTERNATIONAL TRUST COMPANY,

PLAINTIFF IN ERROR,

v.

JOHN W. WEEKS, Agent of the Shareholders of the Broadway National Bank,

DEFENDANT IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for Plaintiff in Error.

Statement of the Case.

This was an action of contract, brought by the International Trust Company, a banking corporation established under the laws of the state of Massachusetts, plaintiff in error, against the defendant Weeks, as shareholders' agent of the Broadway National Bank, in the United States Circuit Court for the District of Massachusetts under the act of August 13, 1888, c. 866, sec. 4, to recover damages

for breach of covenant contained in a written lease of certain premises on Milk street in Boston, Mass., entered into between the Broadway National Bank and Henry Parkman *et al.*, the predecessors in title of the International Trust Company.

August 11, 1898, Henry Parkman *et al.* executed the lease in question for the term of ten years from April 1, 1889, at a rental of $6000 yearly, the premises so leased consisting of the first floor and basement of the building.

The lease contained the following provisions: —

> "The lessors . . . lease unto the said lessee the following premises in the building . . . viz., the premises now occupied by said bank, namely the banking-rooms on the first floor of said building and the basement under the same . . . *to be used as the business offices of said corporation and for no other purpose.*
>
> . . . . . .
>
> "And the said lessee . . . hereby covenants . . . that it . . . *will not assign this lease nor underlet the whole or any part of the said premises* without permission in writing being first given by the lessors . . . and also that the *said leased premises* or any part thereof *shall not be occupied* or used by the lessee or those holding under it *for any other purpose or business* than that for which the same are hereby leased and which is expressed in this lease. . . .
>
> "Provided, always, and these presents are upon this condition, that if the said lessee or its successors or assigns do or shall neglect or fail to perform and observe any or either of the covenants contained in this instrument, which on its or their part are to be performed, or if the said lessee shall be declared

bankrupt or insolvent according to law, or if any assignment shall be made of its property for the benefit of creditors, then and in either of the said cases the lessors, or those having their estate in the said premises, lawfully may, immediately or at any time thereafter, and whilst such neglect or default continues, and without further notice or demand, enter into and upon the said premises or any part thereof, in the name of the whole and repossess the same as of their former estate, and expel the said lessee and those claiming under it, and remove its effects (forcibly, if necessary), without being taken or deemed guilty of any manner of trespass, and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant; *and thereupon the lessors may, at their discretion, relet the premises, at the risk of the lessee, who shall remain for the residue of said term responsible for the rent herein reserved and shall be* credited with such amounts only as shall be by the lessors actually realized." (Record, pp. 8, 9, 10.)

March 28, 1899, Henry Parkman and others, the original lessors, sold the land and building to the International Trust Company.

December 16, 1899, the bank became insolvent, and the comptroller of the currency appointed a receiver.

After December 16, 1899, and before January 5, 1900, the president of the plaintiff corporation, in behalf of the plaintiff, entered upon the premises. (Record, p. 20.)

February 15, 1900, the comptroller released the estate of the bank to the defendant as the stockholders' agent.

The demised premises were occupied by the receiver,

and afterwards by the defendant, from the time of the failure of the bank up to and including May 18, 1900, and full compensation therefor was paid to the plaintiff under an agreement of the parties that the same should not affect or prejudice their respective legal rights. (Record, p. 20.)

After the defendant ceased to occupy the demised premises, the plaintiff let a portion of the same, to wit, the basement, receiving full rent therefor, but did not let the banking rooms, and the same remained vacant, though the plaintiff made efforts to let them, as stated in the evidence of the president, Mr. Graham, and of others. (Record, pp. 21–27.)

This action was brought for breach of covenant in the lease, the damages claimed being an amount equal to that to which the plaintiff would have been entitled as rent, less the amounts received from letting part of the premises. The details of the claim are stated in Plaintiff's Exhibit 11 (Record, p. 55), and the amount claimed is $4556.56, with interest.

The defence was that it was the plaintiff's duty, upon terminating the lease, to use all reasonable efforts to relet the demised premises, so as to minimize the damages, and that the plaintiff had not used such efforts and had arbitrarily refused to accept suitable and responsible parties as tenants, and that if the plaintiff had accepted such parties as tenants it would have received as much or more rent than that reserved in the lease. (Record, pp. 12, 13, 16.)

At the first trial a verdict was ordered and rendered for the plaintiff for the amount claimed, and judgment was entered thereon, but on defendant's exceptions to the rulings of the presiding judge and writ of error thereon to the Circuit Court of Appeals, this judgment was reversed and

the case remanded to the Circuit Court. (Record, p. 4. *Weeks* v. *International Trust Co.*, 125 Fed. Rep. 370.)

The Trust Company then brought a petition to the United States Supreme Court for writ of error to the Circuit Court of Appeals, together with an assignment of errors, and the same was duly allowed and citation issued. The defendant in error moved to dismiss for want of jurisdiction, his contention being that the judgment of the Circuit Court of Appeals was not a final judgment and was therefore not reviewable on that writ of error.

The United States Supreme Court, by an opinion reported in 193 U.S. 667, sustained the defendant's contention and dismissed the writ of error.

At the second trial a verdict was rendered for the defendant (Record, p. 19), and judgment was entered thereon.

The case then went up, upon plaintiff's exceptions and writ of error based thereon, to the Circuit Court of Appeals, which affirmed the judgment of the Circuit Court (Record, p. 70), and it now comes before this Court on writ of error to the Circuit Court of Appeals sued out by the plaintiff. (Record p. 1.)

The plaintiff's assignment of errors in the judgment of the Court of Appeals, is to the refusal of the Circuit Court, approved by the Circuit Court of Appeals, to rule as follows: —

1. That upon the insolvency of the lessee Broadway National Bank the plaintiff was entitled to enter upon the premises and to repossess the same as of its former estate and at its discretion to relet the premises at the risk of the

lessee bank, in which case the lessee bank would remain liable (under its covenant to that effect) for the residue of the term for the amount stipulated as rent in the lease, less such amounts as should be collected by the plaintiff for the rent or use and occupation of the premises or of any part thereof.

2. That in order to hold the lessee bank liable for the amount of the rent for the residue of the term under said covenant it was not obligatory upon the plaintiff to notify the bank of its election so to do.

3. That in order to hold the lessee bank liable for the amount of the rent for the residue of the term under said covenant it was not obligatory upon the plaintiff to relet the premises or to attempt to relet them. (Record, p. 67.)

The presiding judge in the Circuit Court declined to give these instructions (Record, p. 39), but instructed the jury upon the points covered by these prayers as follows: —

> "By the very terms of the lease and the relations of the parties this property was devoted during the term of this lease, if not strictly to the occupancy of the Broadway National Bank, yet to an occupancy of the same character and class akin thereto, that is to say for banking purposes, either by a banking corporation or by some concern that was doing a banking business as generally understood and the International Trust Company, when it came to relet the property, had a right to consider that fact and take the benefit of that fact and you may consider it when you come to pass upon this question and give it full effect in the spirit and in the way I point out to you." (Record, p. 43.)
>
> . . . . . .
>
> "In order to make Mr. Weeks liable under the

provisions of the lease, the International Trust Company must, within a reasonable time after entering into possession, have made its election to relet and manifest that election by a reasonable attempt to do so." (Record, p. 46.)

. . . . . .

"I submit to you what, under the circumstances, was a reasonable time. Also I submit to you the question whether or not it did elect to relet at the risk of the Broadway National Bank or its agent and whether or not it manifested its intention to relet by an attempt so to do." (Record, p. 47.)

. . . . . .

"In my judgment if you find as early as before this dispute arose, now more than four years ago, the parties to this controversy understood and admitted they understood the position as claimed now by the plaintiff, you should hesitate and have clear evidence before you disturb, more than four years afterwards, the condition of facts as then apparently understood by both parties. Now Mr. Weeks, under date of May 16, 1900 [Plaintiff's Exhibit 12, Record, p. 55] first gives this clause which I read to you. He says, 'I did not understand that this clause enabled the lessors to occupy the premises or any of them.' Then he goes on and says that he tenders the International Trust Company a tenant, that is the Beacon Trust Company, at a rent of $4500 a year, and then he says that the Beacon Trust Company being rejected, 'I claim of you that the rent should be credited with the sum of $6500 per annum and that I should receive from you $500 a year during the remainder of the term. That is the excess amount of rent he is entitled to re-

ceive — $500 a year, the excess rent. And in reply to that, under date of May 18, 1900, the president of the International Trust Company replies and says that the understanding of Mr. Weeks is correct, that the International Trust Company intends to hold him for the rent during the term of the lease, subject to what they may receive by subletting." (Record, p. 47.)

. . . . . .

"Assuming that it had taken possession of the premises under such circumstances that in accordance with the terms of the lease it had a right to sublet at the risk of the Broadway National Bank or its agent in winding up its affairs, then, gentlemen, for the plaintiff you must find that it made honest and reasonable efforts to relet; that its efforts must be such, those which a reasonable land owner, under the circumstances, — that it must have made honest and reasonable attempts to relet and that its efforts must be those which a reasonable land owner would make under the circumstances." (Record, p. 48.)

. . . . . .

"In the first place you are to consider whether the Beacon Trust Company comes within the character of tenants who alone are admissible to that building, that is to say, tenants who are doing practically the business of the Broadway National Bank or a business akin to it in the way I have explained. In the second place we must take, for the purpose of determining this question, the relation of the International Trust Company as bearing on the question to be considered whether some period of time and that period of time, I instruct you, is the period of time when the

International Trust Company was required to exercise its discretion, use its judgment, — using reasonable care and skill with reference to its business, and not the previous time." (Record, p. 49.)

. . . . . .

"You see that these two questions are first, has the defendant [plaintiff] proved by reasonable preponderance of the evidence that it elected to relet the premises and seasonably manifested that election and secondly, has it used reasonable care in subletting or reletting the property? Upon either of these topics if the plaintiff has not satisfied you by the fair preponderance of the case, as I have explained to you, your verdict must be for the defendant. If upon both it has satisfied you, your verdict must be for the plaintiff." (Record, p. 51.)

The plaintiff submits that the learned presiding judge erred in declining to rule as requested and in the instructions given by him so far as they were in conflict with the plaintiff's requests, and that it was error on the part of the Circuit Court of Appeals to approve the rulings of the Circuit Court.

The jurisdiction of the federal court is given by the National Banking Association Act of August 13, 1888, c. 866, sec. 4 (25 St. 436), as follows: —

"That all national banking associations established under the laws of the United States shall, for the purposes of all actions, by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located; and in such cases the circuit and district courts shall

not have jurisdiction other than such as they would have in cases between individual citizens of the same state. The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank."

A receiver of a national bank may be sued in the Circuit Court irrespective of citizenship.

Auten v. *U.S. Bank*, 174 U.S. 125.

The stockholders' agent may likewise be sued in the Circuit Court.

In re Chetwood, 165 U.S. 443, 459.
Guarantee Co. v. *Hanway*, 104 Fed. Rep. 369.

The right to a review of this case by the Supreme Court of the United States on writ of error is given by U.S. St. 1891, c. 517, sec. 6 (26 St. 828).

Argument.

In considering the rights and liabilities of the parties under this lease it is to be noted, —

1. That the demised premises were "to be used as the business offices of said corporation [Broadway National Bank] and for no other purpose. . . . The said leased premises or any part thereof shall not be occupied or used by the lessee or those holding under it for any other purpose or business than that for which the same are hereby leased and which is expressed in this lease, without permission in writing first given by the lessors."

2. That the lessee could not assign the lease or under-

let the whole or any part of the demised premises without permission in writing being first given by the lessors.

3. That in case of breach of covenant by the lessee the lessors might enter and repossess themselves as of their former estate and "at their discretion, relet the premises, at the risk of the lessee, who shall remain for the residue of the said term responsible for the rent herein reserved and shall be credited with such amounts only as shall be by the lessors actually realized."

It may be that the terms of this lease were onerous upon the lessee. But the original lessors had the right to make them and the plaintiff, in purchasing the property of the original lessors, was necessarily influenced by the terms of this lease and had the right to the benefit of them. They had the right to limit the use of their property in such way as should in their judgment secure their interests and the lessees are bound by the stipulations in the lease. As was said by the Court in *Minot* v. *Joy*, 118 Mass. 308, —

> "We cannot alter the written contracts of parties upon the mere suggestion that the course of events has occasioned a hardship to one of them, that was not considered in making the agreement. On the contrary, we must suppose that the lessors were induced to make the lease, by the expectation that they were to be absolutely relieved of the taxes during the entire term; and were also to receive rent during the term if the building should last so long."

See also *Wilkinson* v. *Libbey*, 1 Allen, 375.
Amory v. *Melvin*, 112 Mass. 83.

In *Hunnewell* v. *Bangs*, 161 Mass. 132, the plaintiff asked the Court to construe the word "such" in such

manner as to reach a construction more favorable to him and more likely to prevent supposed injustice. The Court, HOLMES, J., said, —

> "Extreme cases are put to illustrate the sacrifice of a tenant's rights which might happen if the words are taken in their strict grammatical sense. The answer to such case is that leases are bargains, and that it is not to be supposed that a tenant would make a bargain in which he did not see his advantage. Any chance of loss taken by the lessees is part of the consideration of the lease."

The plain intent and the express agreement of this lease were that the demised premises were to be used for the business offices of the Broadway National Bank and for no other purpose whatever without the written consent of the lessor. The use of the premises for "an occupancy of the same character and class akin thereto . . . for banking purposes, either by a banking corporation or by some concern that was doing a banking business," to use the language of the learned presiding judge (Record, p. 43), was as much a violation of the terms of the lease as the use for a restaurant or a tailor's shop. The lessor might, for any reason it saw fit, consent to such different use, but without that consent the lessee could not use the premises except for the purposes limited in the lease.

So long as the lessee performed its obligations under the lease it had the right to use the premises for these limited purposes. If it failed to pay rent or violated any other covenant of the lease it still remained liable for the rent and it could not assign the lease or underlet the premises without the consent of the lessor.

In such circumstances it could get no return nor rebate

whatever in reduction of the amount of the rent for which it would continue liable.

But the lessor then had the right to enter and to resume possession of the premises for its own use, or, at its option, to relet the premises at the risk and for the benefit of the lessee "who shall remain for the residue of said term responsible for the rent herein reserved and shall be credited with such amounts only as shall be by the lessors actually realized." (Record, p. 10.)

If the lessor elected to relet the premises "at the risk and for the benefit of the lessee," it must, as stated by the learned presiding judge, within a reasonable time manifest its intention to relet for the benefit of the lessee, but this manifestation of intention need not be either by formal notice to the lessee or by a letting of the premises. If the evidence shows that upon the entry by the lessor it intended to relet the premises, and that the lessee understood that the lessor intended to relet the premises, at the risk and for the benefit of the lessee, this constitutes sufficient notice or waiver of notice by the lessee to satisfy the obligation resting on the lessor. There was, in fact, no controversy between the parties on this point. The defendant himself occupied and paid rent for the premises to May 18, 1900. Two days before that date, viz., May 16, 1900, he wrote the president of the plaintiff company that he understood that the plaintiff "claims to hold the Broadway Bank responsible for the rent of said premises during the remainder of the term under the following clause in said lease, to wit:" quoting the clause now under consideration and proposing the Beacon Trust Company as a tenant (Plaintiff's Exhibit 12, Record, p. 55), and the president of the plaintiff replied on the same day that the defendant was right in his assumption.

(Plaintiff's Exhibit 13, Record, p. 56.) The plaintiff proceeded forthwith to take proper steps to secure tenants, and, in fact, succeeded in letting the basement of the demised premises for substantially all the time covered by the term involved in this suit. There is nothing in the pleadings to indicate that the defendant set up or relied upon any want of notice from the plaintiff of its intention to relet at the risk and for the benefit of the lessee under this clause. Moreover, the charge of the learned presiding judge, as already quoted (Record, p. 47), indicated that in his judgment there was no controversy on this point. Under these circumstances the plaintiff waives the second assignment of error.

The Court of Appeals said (125 Fed. Rep. 370, at page 377) that the evidence in the record of the first trial that the president of the Trust company told several persons who inquired the price of the premises that he asked $6000 for the banking rooms, and that he never quoted a lower price, was sufficient to warrant a jury in finding that the plaintiff did not elect its remedy of reletting the premises. It is not now necessary to consider whether that Court correctly understood the evidence as there reported, or whether such evidence, if it existed, had any legal bearing upon the issue of the plaintiff's election, whatever may have been its weight on the issue of reasonable management if such an issue was involved. There is no such evidence in the present record. There was no evidence that the president of the Trust company "never quoted a lower price" than $6000 for the banking rooms. In one instance, that of Armstrong Company, whom he was soliciting to rent the premises, he gave the price of $6000, but he gave to the broker employed by him $4000 as the price; $4000 was the price to be paid by the Title

Insurance Company, and $4500 by the Beacon Trust Company. There was nothing to show that the failure to let the banking rooms was due to any unreasonable demand for excessive rent. (See Mr. Graham's evidence, Record, pp. 21–27.)

The single issue in this case is whether, the plaintiff having elected to relet for the benefit of the lessee, it was a question for the jury whether it used reasonable efforts to relet or whether the reletting was to be according to its discretion, and was not subject to revision by the jury.

The plaintiff contends that the lessor was entitled to use its discretion in the matter and that the lessee is liable for the amount due as rent less such amounts as have been actually received for rent or for use and occupation.

I.

That a lessee may, under a clause in a lease substantially like that in the present lease, be held liable for the amount of the rent, less such amounts as may be actually collected, is well established.

Way v. *Reed*, 6 Allen, 364.
Edmands v. *Rust & Richardson Drug Co.*, 191 Mass. 123.
Ex parte F. J. Lake et al., 2 Lowell, 544.
Grommes v. *St. Paul Trust Co.*, 147 Ill. 634; 47 Ill. App. 568.
Hall v. *Gould*, 13 N.Y. 127.

The entry of the lessor upon the premises and taking possession of the same as of its former estate terminated the right of the lessee to occupy, but did not terminate its liability under the lease.

By the lease, this property was devoted during the term of the lease to the use by the Broadway Bank for its banking offices, and for no other purpose, and the lessor was not obliged to let the premises for any other purpose. The presiding judge in the Circuit Court said on this point, —

> "By the very terms of the lease and the relations of the parties this property was devoted during the terms of this lease, if not strictly to the occupancy of the Broadway National Bank, yet to an occupancy of the same character and class akin thereto; that is to say, for banking purposes, either by a banking corporation or by some concern that was doing a banking business, as ordinarily understood, and the International Trust Company, when it came to relet the property, had a right to consider that fact and take the benefit of that fact, and you may consider it when you come to pass upon this question and give it full effect in the spirit and in the way I point out to you." (Record, p. 43.)

But it is submitted that this application of the *cy près* doctrine was erroneous. There was no basis for the ruling that the terms of the lease contemplated a reletting for "an occupancy of the same character and class akin thereto."

2.

The plain and natural construction of the lease, especially in view of the clause that the use of the premises was limited to the business offices of the bank, is that the lessee was to be held for the entire rent less such amounts as might be collected, and that any reletting was to be at the lessor's discretion.

The construction of the lease contended for by the plaintiff was approved by the learned judge of the Circuit Court at the first trial of this case:

> "I think the construction which the defendant asks me to put on it [the covenant in the lease] is a narrow one, and rather a strained one, which I would not be justified in giving it. Take the clause as it stands, and referring to the words 'thereupon the lessors may at their discretion relet the premises,' the defendant says that that imposes upon the plaintiff a certain duty to use reasonable efforts to rent the property. I do not so read it, at least as far as this court is concerned. I cannot justly hold that the International Trust Company intended to assume any risk. I think the fair construction of it is that they did not intend to incur any risk but that they intended to use their own discretion in the matter absolutely."
>
> *Weeks* v. *International Trust Co.*, 125 Fed. Rep. 370, at page 375.

The clause is to be read the same as if the language was "and the lessee shall remain responsible for the rent."

In *Ex parte Lake*, *ubi supra*, where the language of the lease was identical with that in the present case, Judge LOWELL said, at page 547, —

> "It seems to provide that the lessees, after a breach, shall remain liable for the rent precisely as before, excepting that they are to be credited with any sums actually received for use of the premises."

In *Grommes* v. *St. Paul Trust Co.*, *ubi supra*, the lease provided that the lessor might re-enter "without such

re-entry working a forfeiture of the rents to be paid during the full term of the lease," and it was held that the lessor might, after re-entry, recover rent for the entire term, less such rent if any, as he had obtained from a reletting of the premises. The Court said, —

> "There is nothing illegal or improper in an agreement that the obligation of the tenant to pay all the rent to the end of the term shall remain, notwithstanding there has been a re-entry for default; and if the parties choose to make such an agreement, we see no reason why it should not be held to be valid as against both the tenant and his sureties. . . . It may not be strictly accurate or correct to call the money to be paid after re-entry 'rent,' or to treat the lease as in force after a re-entry. But the parties have a right to fix the amount of the rent to accrue according to the terms of the lease as the amount of damages to be paid by the tenant in case of a breach of his covenants. It can make but little practical difference whether the sum agreed to be paid be called 'rent' or 'damages.' It may be regarded as damages for the purposes of this suit. *Hall* v. *Gould*, 13 N.Y. 127; *Underhill* v. *Collins*, 132 N.Y. 269. In *Hall* v. *Gould*, *supra*, the lessor reserved the power in the lease to enter upon the premises for a breach of covenant, and 'to relet the same for the benefit of the lessee.' During the term the lessor sued in ejectment and recovered possession, and thereafter endeavored to relet the premises for the remainder of the term, but failed to do so. It was there held that although, by the entry for condition broken, the estate of the lessee was at an end, and rent, as such, could no longer accrue to the lessor from the lessee, yet the provision

that the lessor, in case of re-entry, was to relet the premises for the benefit of the lessee, indicated it to be the intention of the parties that the lessee should remain answerable for any loss of rent to the lessor; that there was nothing unreasonable in the agreement of a lessee to completely indemnify his lessor for any injury which might arise to him by the lessee's breach of his own agreement; and that the lessor could recover the sum to which he was entitled under the terms of the lease as indemnity for such injury, even though that sum was called 'rent,' when in point of law it was not, strictly speaking, rent. If the liability of the lessee for rent occurring after a re-entry by the lessor may be inferred from a provision authorizing the lessor to relet for the benefit of the lessee, there can be no doubt about the liability of the lessee for such subsequent rent under his express stipulation that the re-entry shall not work a forfeiture thereof."

So in *Woodbury* v. *Sparrell Print*, 187 Mass. 426, where the lease provided that in case of a termination of the lease by the lessor for a breach of the covenants, the lessee should be "liable for all loss and damage sustained by the lessors on account of the premises remaining unleased, or being let for the remainder of the term for a less rent than that herein reserved," it was held that the lessee was liable.

The language of the leases in the several cases referred to differs, but all the provisions are to the same effect, that after entry by the lessor for breach of a covenant in the lease the lessee is to remain liable for the rent or for damages equal to the rent, less such amount as might be collected by the lessor from other tenants, and none of the

cases hold or suggest that any obligation rests upon the lessor in the way of reasonable care in reletting, which he must show has been performed by him as a condition precedent to his recovery. It is claimed with confidence that there is no decided case, under any form of lease, which provides in substance that the liability of the lessee after re-entry by the lessor, for rent or for damages equal to the rent, shall continue, in which such doctrine has been stated or approved. It would be strange, if with such provisions in different forms of language in force in leases in different parts of the country and with the constant litigation between lessors and lessees, that such a principle should now for the first time have to be enunciated. The absence of any decision supporting the respondent's view is strong authority for the proposition that his view is untenable.

It may be said that the opinion of the Supreme Court of Massachusetts in *Edmands* v. *Rust & Richardson Drug Co.*, *ubi supra*, conflicts with this construction of the lease. But the plaintiff does not so understand that opinion. In that case the covenant was as follows: "But the lessee covenants to be responsible for any loss or diminution of rent sustained by the lessors in consequence until the end of the lease." The lease did not limit or restrict the use to be made of the premises, nor did it contain the words "at their discretion."

The case went to the Supreme Court on defendant's exceptions, the principal one of which was that there was no evidence to show that the plaintiff after regaining possession had managed the property in good faith. Another exception was to the refusal of the trial judge to rule that the lessor was not bound by the determination of the

defendant that a prospective tenant was financially satisfactory. The Supreme Court held that the rulings of the Superior Court were sufficiently favorable to the defendant, and overruled the exceptions. If there is anything in the opinion tending to support the defendant's contention in this case, it was not called for by any question then before the Court and was *obiter dictum*.

There is nothing in *Bowditch* v. *Raymond*, 146 Mass. 109, conflicting with the plaintiff's contention. In that case it does not appear that any limitation on the use to be made of the premises was imposed by the lease, or that there was any provision against assigning, but the clause in regard to reletting by the lessor after regaining possession was similar to that in the present case. The only question presented to the Court in that case was whether the lessors, who took possession for breach of covenant before the lessees filed a petition in insolvency, and had not notified the lessees of their intention to relet at their risk and for their benefit before such petition was filed, and did not relet until after the petition was filed, could prove in insolvency an amount equal to the difference between the rent reserved and the sums collected. The Court held that such proof could not be made for the obvious reason that at the date of the insolvency proceedings the liability of the lessees was contingent, and that contingent claims could not be proved under the statute.

The lessor in the case at bar in effect said to the lessee, —

> "I will let these premises for the term of the lease for the use of your bank and for no other use whatever. If you fail to perform your obligations under the lease and I am compelled to retake possession, and I do not desire to occupy the premises myself, I

will relet them for your benefit and I will notify you to that effect, but I must be left to exercise my discretion in regard to such reletting. I do not intend that the premises shall be used for any purpose likely to diminish the value of the whole estate or by any unsuitable tenant or for any objectionable business or for any use which shall conflict with my own business interests or to anyone who may be a competitor in my line of business and I must be allowed to determine these questions absolutely. I do not propose to give you an opportunity to claim before a jury that I have not used proper efforts to relet the premises or have objected to proposed tenants for insufficient reasons. If you care to make the contract on such terms, you can make it. If not, you need not take the lease."

When the International Trust Company bought the property it owned and occupied for its own offices the building adjoining that in which were the demised premises. The Trust company knew of these provisions of the lease and bought in reliance upon them and with the knowledge that, in case the Broadway Bank should be unable to keep the premises, the Trust company, in gaining possession, might exercise its absolute discretion as to reletting them.

The plaintiff submits that the Circuit Court of Appeals, in overruling the construction of the lease as originally made by the Circuit Court, ignored the plain meaning of the lease. It did not refer in its opinion specifically to the clause upon which the plaintiff relies and upon which the Circuit Court based its ruling.

See 125 Fed. Rep. 370, at page 376.

It imposed an obligation on the lessor which is not stated in the contract either expressly or by implication and it ignored the limitation of the uses to which the premises could be put by the lessee, the clause against assigning, and the clause "at their discretion."

The Court of Appeals says in its opinion, —

> "The injustice which would result from the plaintiff's construction of the lease makes it impossible that the parties intended such a construction. In argument, the plaintiff's counsel admitted that the lessee's liability under the covenant would cease if the premises were destroyed by fire or were actually used by the lessor. But to concede this is to abandon the plaintiff's whole contention. There is no material distinction between the actual use of premises by the lessor, and his possession of premises with an intent to prevent actual use by anybody else, and there is none between a general refusal to relet and an unreasonable refusal to relet to a suitable tenant."
>
> 125 Fed. Rep. 370, at page 376.

If after the lessor gained possession it used the premises for its own purposes, it is of course conceded that the lessee would not be liable under the covenant; so if the premises, after the lessor took possession, were destroyed by fire and the lessor did not rebuild, it would be unreasonable to claim that the lessor could hold the lessee for rent or for breach of the covenant of the lease. The lease itself provides that in case of fire the rent should be suspended until the premises were rebuilt, and the lessee would be entitled to the benefit of that clause as well after the lessor took possession as before.

The plaintiff submits, therefore, that the concession made in the argument before the Circuit Court of Appeals and upon which that learned Court apparently based its decision, was a correct statement of the law, and was entirely consistent with the construction of the lease for which the plaintiff contends.

3.

The uncontroverted evidence in this case is the best illustration of the value of this clause as properly interpreted to protect the lessors, and of the danger and strong chance of injustice of leaving to a jury such an issue as was presented in this case.

The plaintiffs were the owners of the premises immediately adjoining the demised premises and there carried on the business of a trust company. When the Broadway Bank failed the lessors naturally desired, in reletting the premises, to secure a responsible tenant or tenants, conducting a kind of business which would not injure the value of the estate and would not conflict with the lessor's business. It declined to accept as tenants for the banking rooms three proposed tenants only: first, the Beacon Trust Company, a competitor in the same line of business as the plaintiff; second, a title insurance company whose financial responsibility was at least doubtful, and third, a tailoring establishment which required large and expensive alterations in the building. The presiding judge said, in reference to these proposed tenants, at the first trial of the case, —

> "I find, on sifting out the testimony, only three tenants actually brought to the International Trust Company in such a form as to present to it a fair

question for solution. The first was the Beacon Trust Company, which it was clearly justified, and correct, in disregarding; the second was the Title Insurance Company as to which, under the circumstances, it was justified in using its discretion. Whether or not its conclusion is correct, it was a case where it had a right to solve according to its own discretion. The same with reference to the tailoring establishment."

Weeks v. *International Trust Co.*, 125 Fed. Rep. 370, at page 375.

The evidence on this point at the second trial was the same, but under the decision of the Circuit Court of Appeals the learned judge was compelled to submit to the jury this question of reasonable efforts on the part of the lessor in face of his own judgment that there was no evidence of either wilful refusal or want of care, and that in any event the contract did not impose on the lessor the duty of establishing due care in the management of the property as a condition for recovery.

After the verdict for the defendant in the second trial, the plaintiff moved to set it aside on the ground that it was against the evidence and the weight of the evidence.

The opinion of the learned judge of the Circuit Court overruling this verdict (Record, p. 61) shows clearly that he had submitted the case to the jury under a construction of the contract which he did not approve, and that he felt himself constrained to deny the motion for a new trial, although there was nothing before the jury affecting the good faith of the plaintiff or tending to show want of reasonable care.

The learned judge says, —

"It is said by the plaintiff, and justly so, that at the present trial no evidence was produced with reference to proposed tenants, specifically named, additional to what appeared at the first one. It further says that our rulings at the first trial with reference to the evidence then produced, including that as to the Beacon Trust Company, the Title Insurance Company, and the tailoring establishment, were not challenged by the Circuit Court of Appeals. This is undoubtedly true in a literal sense of the expression because excepting only, perhaps, as to the Beacon Trust Company, the Circuit Court of Appeals completely cut out the foundation of the principal rule which this court applied at the first trial. Therefore, what the court then said with reference to various proposed tenants became mostly irrelevant. At the first trial the court, in these expressions, was speaking in view of the rules then laid down, namely, that the plaintiff accepted no risk with regard to using reasonable efforts to rent the property, but that, nevertheless, it could not abuse its discretion or proceed with any degree of wilfulness. Under the rule given by the Circuit Court of Appeals the case entirely changed as to these particulars. It then remained to be determined whether the only objection which the International Trust Company made to the Title Insurance Company, for example, even though honestly made, namely, the objection in regard to its future probable solvency, was a reasonable one in view also of the fact that the plaintiff was standing on the claim that the defendant was responsible for whatever the plaintiff did not, in fact, collect from

the new tenants. Such a question of reasonableness was clearly for the jury.

. . . . . .

"When we submitted the cases to the jury, we certainly would not have done so unless we had then believed that it was in such a condition that we would not be justified in setting aside the verdicts if rendered for the defendant." (Record, pp. 65, 66.)

It is well settled that where a tenant abandons the possession of the premises during the continuance of the tenancy the landlord is not bound to re-enter and attempt to relet them for his benefit.

18 Am. & Eng. Ency. (2d ed.) 303, and cases cited.

Clendenning v. *Lindner*, 30 N.Y. Supp. 543.

This contract was made, and is to be construed, in the light of this rule, and was intended to relieve the lessor from a liability such as claimed.

According to the defendant's contention, the plaintiff might have relet the entire demised premises, with the exception of a single room, and yet the defendant could have gone to the jury on the question as to whether the plaintiff was at fault in declining to accept a tenant for that room.

Here, the plaintiff let the basement and received full rent. It declined only three proposed tenants for the banking room for reasons which were deemed entirely sufficient by the learned judge of the Circuit Court, and yet, under the construction of the lease, as made by the Circuit Court of Appeals, it was left to a jury to say whether the plaintiff had used reasonable care in declining to accept one or

all of these tenants, and the trial judge found himself powerless to disturb a verdict which was contrary to his own previously expressed opinion.

INTERNATIONAL TRUST COMPANY,
by its Attorneys,
ROBERT M. MORSE,
WILLIAM M. RICHARDSON.

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No. 31.

Supreme Court of the United States.

OCTOBER TERM, 1905.

INTERNATIONAL TRUST COMPANY,
PLAINTIFF IN ERROR,

v.

JOHN W. WEEKS, Agent of the Shareholders of the Broadway National Bank,
DEFENDANT IN ERROR.

Brief for John W. Weeks, Defendant in Error.

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Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 282.

INTERNATIONAL TRUST COMPANY,
PLAINTIFF IN ERROR,

v.

JOHN W. WEEKS, Agent of the Shareholders of the Broadway National Bank,
DEFENDANT IN ERROR.

Brief for John W. Weeks, Defendant in Error.

Statement of Facts.

This is an action of contract, brought in the Circuit Court of the United States for the District of Massachusetts, for rent alleged to be due under the terms of a lease made by Henry Parkman and others to the Broadway National Bank. The demised premises consisted of the first floor and basement of the building numbered 39 on Milk street in the city of Boston. The premises at 39 Milk street were, at the time the suit was brought, owned

in fee by the International Trust Company, to which they had been transferred by the original lessors. A copy of the lease, which is dated August 11, 1898, and is for a period of ten years from April 1, 1899, at a rent of $6000 a year, is set forth on page 8 of the record.

The Broadway Bank was a national banking association, authorized under the acts of Congress, the charter of which was to expire October 3, 1904. Said bank became insolvent, and the Comptroller of the Currency appointed Daniel G. Wing receiver of said bank on December 16, 1899. On January 5, 1900, the president of the International Trust Company, in the name and in behalf of said company, entered upon the demised premises and repossessed the plaintiff in error of the same as of its former estate by virtue of a condition contained in the lease authorizing such action, in case the lessee should be declared bankrupt or insolvent according to law, or if any assignment should be made of its property for the benefit of creditors. John W. Weeks was duly elected stockholders' agent of said bank, pursuant to the act of Congress of June 30, 1876 (19 Stats. 63), and the acts amendatory thereof and supplementary thereto, and on February 15, 1900, the Comptroller of the Currency released the estate of the Broadway National Bank to John W. Weeks, stockholders' agent. The premises were occupied, first by the receiver and then by the stockholders' agent, until May 18, 1900, when they were vacated, the keys were surrendered, and all liability for further rent disclaimed by the said Weeks, and the Trust Company was paid for the occupation of the receiver and the said agent, at the rate of the rent reserved in the lease, up to said date.

Record, pp. 20, 60.

The parties agreed that this occupancy and payment should not affect or prejudice their respective legal rights.

Record, p. 20.

It is provided in the lease, after the clause authorizing an entry for breach of covenant that —

> "thereupon the lessors may, at their discretion, relet the premises, at the risk of the lessee, who shall remain for the residue of the term responsible for the rent herein reserved and shall be credited with such amounts only as shall be by the lessors actually realized."

Record, pp. 9, 10.

The claim of this action is that by force of the above provision the Trust Company is entitled to recover the rent alleged to be due on the last days of May, June, July, August, September, October, November, and December, 1900, and January, February, March, April, and May, 1901, the writ being dated June 21, 1901.

Record, pp. 5, 6.

At the time of the entry a portion of the basement was occupied by sub-tenants of the Broadway Bank, who were not disturbed by the Trust Company, and from whom it collected rent, crediting the defendant in error with the amounts so received.

Record, p. 21.

A demurrer having been filed to the defendant's amended answer, a hearing was had in the Circuit Court on said demurrer and on the question of jurisdiction. The

Court determined that it had jurisdiction, and sustained the demurrer June 29, 1902.

116 Fed. Rep. 898.

The defendant thereafter had leave to amend his answer, and the case was subsequently tried in the Circuit Court. The Court directed a verdict for the plaintiff in the sum of $5077.97, this being the total amount of rent, with interest, due for the above-mentioned period, less what had been actually received by the plaintiff as rent of the basement.

The defendant duly saved exceptions to the ruling of the Court in sustaining its own jurisdiction, in refusing defendant's motion that a verdict be directed for the defendant, to certain portions of the charge to the jury, and to the Court's refusal to give certain instructions requested by the defendant.

On January 13, 1903, judgment was entered for the plaintiff in the sum of $5123.66.

Record, p. 4.

On February 16, 1903, a writ of error duly issued from the Circuit Court of Appeals for the First Circuit to said Circuit Court. The cause was thereafter argued in the Circuit Court of Appeals, and on October 6, 1903, judgment was entered in that court, reversing the judgment of the Circuit Court setting aside the verdict, and remanding the case to the Circuit Court for further proceedings in accordance with the opinion of the Circuit Court of Appeals.

125 Fed. Rep. 370.

Thereafter, on October 29, 1903, a writ of error issued from this Court to the Circuit Court of Appeals. A motion

to dismiss said writ of error was submitted by said Weeks on February 29, 1904, and on March 7, 1904, the writ of error was dismissed by this Court for want of jurisdiction.

International Trust Co. v. *Weeks*, 193 U.S. 667.

The case was then again tried in the Circuit Court, and on November 22, 1904, the jury returned a verdict for the defendant.

Record, p. 19.

A motion for a new trial filed by the plaintiff on November 25, 1904, was denied on December 27, 1904.

Record, pp. 19, 61.

Judgment was entered for the defendant in the Circuit Court on January 25, 1905.

Record, p. 61.

On January 31, 1905, a writ of error issued from the Circuit Court of Appeals for the First Circuit to the Circuit Court.

Record, p. 2.

The case was thereafter heard in the Court of Appeals, and on May 10, 1905, said Court affirmed the judgment of the Circuit Court on the ground that the record presented no substantial question which was not disposed of by its previous opinion, that the third assignment of error raised again the questions there decided, and that no error was shown by the first and second assignments, as the law

bearing on the subject was sufficiently and correctly stated in the charge.

Record, p. 70.
139 Fed. Rep. 5.

On May 24, 1905, a writ of error issued from this Court to the Circuit Court of Appeals.

Record, p. 1.

Assignment of Errors.

The errors assigned by the International Trust Company, plaintiff in error, are set forth on page 72 of the record, and are as follows: —

"The plaintiff in error in the above-entitled cause files with its petition for writ of error this its assignment of errors, and thereupon says that in the record and proceedings aforesaid there is a manifest error in the following particulars; to wit, —

"1. That said United States Circuit Court of Appeals erred in refusing to rule that upon the insolvency of the lessee, Broadway National Bank, the plaintiff was entitled to enter upon the premises and to repossess the same as of its former estate and at its discretion to relet the premises at the risk of the lessee bank, in which case the lessee bank would remain liable (under its covenant to that effect) for the residue of the term for the amounts stipulated as rent in the lease, less such amounts as should be collected by the plaintiff for the rent or use and occupation of the premises or any part thereof.

"2. In refusing to rule that in order to hold the lessee bank liable for the amount of the rent for the residue of the term under said covenant it was not obligatory upon

the plaintiff to notify the defendant of its election so to do.

"3. In refusing to rule that in order to hold the lessee bank liable for the amount of the rent for the residue of the term under said covenant it was not obligatory upon the plaintiff to relet the premises or to attempt to relet them.

"4. In ruling that in order to make the lessee liable under the covenant of the lease referred to, the lessor must within a reasonable time make its election to relet and must manifest that election by a reasonable attempt to do so.

"5. In ruling that the evidence was sufficient to warrant a jury in finding that the plaintiff in error did not elect its remedy of reletting the premises.

"6. In not ruling that the judgment of the Circuit Court of the United States should be reversed.

"7. In ruling that the judgment of the Circuit Court of the United States should be affirmed."

I.

The First Request was Properly Refused.

The instruction requested is almost exactly in the language of the covenant in the lease, authorizing the lessor, in case of a re-entry, to relet at the risk of the lessee. The construction of this clause constitutes the whole controversy in this case.

At both trials the plaintiff contended that the clause meant that the lessee should remain absolutely liable for the rent for the remainder of the term, and that it rested entirely in the discretion of the lessor whether it should relet the premises or not. On the other hand, the defendant contended that the clause in question gave the lessor no rights whatsoever against the lessee unless the lessor

specifically elected to relet at the risk of the lessee, and made reasonable efforts so to do.

At the first trial the Circuit Court, on this point, charged the jury favorably to the contention of the plaintiff.

125 Fed. Rep. 370.

The Circuit Court of Appeals held that the Circuit Court erred in so instructing the jury, and that in order to make the lessee liable under this covenant the lessor must, within a reasonable time, make his election to relet, and must manifest that election by a reasonable attempt so to do.

125 Fed. Rep. 370.

The jury might have interpreted such an instruction favorably to the defendant, in which case the plaintiff would not be prejudiced by the refusal of the Circuit Court to give the instruction requested. On the other hand, the jury might have interpreted such an instruction favorably to the plaintiff, but in that case they would have been proceeding contrary to the charge of the Circuit Court, —

Record, p. 39, —

and contrary to the opinion of the Circuit Court of Appeals, upon which opinion that charge was founded.

125 Fed. Rep. 370.

If the Circuit Court of Appeals was right in its opinion, then clearly a request for instructions which, although substantially in the words of the clause in the lease relied upon, might have been interpreted by the jury contrary to that opinion was properly refused.

That the Circuit Court of Appeals was right will be shown under section III. of this brief.

Moreover, the point raised by the request was completely covered by the charge, to which plaintiff took no exception. The Circuit Court instructed the jury, —

> "In other words, they might have terminated the lease in the usual sense in which it is understood a lease is terminated. That the International Trust Company might have done. Or, it might, as said in the lease, relet the premises at the risk of the lessee, holding the lessor, that is Mr. Weeks here, as agent, responsible for whatever amounts they should not receive from tenants to whom the premises were let from time to time."
>
> Record, p. 45.

In relation to this point the Circuit Court of Appeals said, —

> "No error is shown by the first and second assignments, as the law bearing on the subject was sufficiently and correctly stated by the learned judge in his charge."
>
> 139 Fed. Rep. 5, 7.

In —

Northwestern Life Ins. Co. v. *Muskegon Bank*, 122 U.S. 501, —

Mr. Justice MILLER, delivering the opinion of the Court, said, on page 510, —

> "If in regard to any particular subject or point pertinent to the case the court has laid down the law correctly and so fully as to cover all that is proper to

be said on the subject, it is not bound to repeat this instruction in terms varied to suit the wishes of either party."

In—

Ayers v. *Watson*, 137 U.S. 584,—

it was held no error to refuse a request for an instruction which was substantially given.

Mr. Justice BRADLEY, delivering the opinion of the Court, said, at page 601,—

"A judge is not bound to adopt the categorical language which counsel choose to put into his mouth. Nothing would be more misleading. If the case is fairly put to the jury, it is all that can reasonably be asked. The instruction as requested, if given as an independent proposition, without qualification, was calculated to mislead the jury and draw their attention away from other marks and monuments equally or more controlling."

See also—

Brown v. *United States*, 150 U.S. 93, 95.

Southern Bell Tel. & Tel. Co. v. *Watts*, 66 Fed. Rep. 460 (Circuit Court of Appeals for the 4th Circuit, 1895).

Where the charge actually states the law, and is comprehensive enough to cover every aspect of the case under the evidence, it is not error to refuse special requests, although sound.

Western Coal & Mining Co. v. *Berberich*, 94 Fed. Rep. 329 (Circuit Court of Appeals, 8th Circuit, 1899).

Denver & Rio Grande R.R. Co. v. *Roller et al.*, 100 Fed. Rep. 738 (Circuit Court of Appeals, 9th Circuit, 1900).

The first assignment of error, therefore, is not well taken.

II.

The Second Request was Properly Refused.

The Circuit Court of Appeals, when this case was first before it (125 Fed. Rep. 370, 376), said, —

> "On the other hand, the lessor may avail himself of the covenant. He may re-enter, and may exercise his discretion to relet the premises at the risk of the lessee. The exercise of this discretion is manifested by a releting or by an attempt to relet. . . . But if the lessor does not relet, and makes no attempt to relet, he has not exercised the discretion nor has he made the election given him by the covenant, and, as we hold, it is only upon the exercise of the lessor's discretion to relet that the covenant imposes a liability upon the lessee. . . . We go further, and hold that, in order to make the lessee liable under this covenant, the lessor must within a reasonable time make his election to relet, and must manifest that election by a reasonable attempt to do so."

At the second trial the jury were instructed in accordance with the law as thus laid down. When the case came again to the Court of Appeals it said that the law on this subject was sufficiently and correctly stated in the charge.

(*a*) The instruction requested is clearly inconsistent

with the foregoing passages from the opinion of the Circuit Court of Appeals.

It is submitted that the Circuit Court of Appeals was right in its opinion for the reason set forth under section III. of this brief.

(*b*) Even if the instruction was correct as an abstract proposition of law, still the plaintiff in error has no ground for complaint because of the affirmance by the Circuit Court of Appeals of the judgment of the Circuit Court, inasmuch as such refusal cannot possibly have affected the plaintiff in error unfavorably. Plainly, no error was committed by the refusal to give the instruction, even if such notification was not necessary, since, as a matter of fact, the plaintiff in error had made its election and had given such notification, and these facts were undisputed and clearly in the minds of all parties.

The defendant did not contend at either trial of this case that the plaintiff had not elected to hold the lessee if it could, or had not notified the defendant in error of such election.

When the case was before the Circuit Court of Appeals for the first time the defendant in error here raised no claim that there had not been such an election, or that the lessee had not been notified of such election. On the contrary, the letter of John M. Graham, the president of the International Trust Company, to John W. Weeks, dated May 18, 1900, and appearing on page 56 of the record as Plaintiff's Exhibit 13, shows conclusively the election of the International Trust Company to hold the Broadway Bank liable for the rent for the remainder of the term if it could, and unmistakably constitutes a notification to John W. Weeks of that election. Therefore the jury cannot possibly have based their verdict on the prop-

osition that it was necessary for the plaintiff in error to notify the lessee bank of its election to hold the lessee liable for the rent for the residue of the term, and that no such notification was given, unless it be assumed that the jury went directly in the face of written evidence contained in a letter which no one disputes was sent by John M. Graham and received by John W. Weeks, and which evidence was upon a point in regard to which there was no dispute between the parties. Such an assumption cannot be made, particularly in view of the instructions of the Circuit Court, which were not excepted to by the plaintiff in error. The learned judge of the Circuit Court instructed the jury as follows: —

> "At the same time it is my duty to call to your attention the effect of the correspondence in this case, and to ask you in view of that correspondence, whether or not at and before the time that this controversy arose, the defendant Weeks did not understand and did not acquiesce in the proposition that the International Trust Company had done all those things which were required to be done by the provision to which I called your attention. I do not say to you, and I wish you to distinctly understand, that those provisions which I read to you are not conclusive. I submit it to you for what it is worth, giving you my impressions about it and saying to you that in my judgment if you find as early as before this dispute arose, now more than four years ago, the parties to this controversy understood and admitted they understood the position as claimed now by the plaintiff, you should hesitate and should have clear evidence before you disturb, more than four years afterwards, the

condition of facts as then apparently understood by both parties. Now, Mr. Weeks, under date of May 6, 1900, first gives this clause which I read to you. He says, 'I did not understand that this clause enabled the lessors to occupy the premises or any part of them.' Then he goes on and says that he tenders the International Trust Company a tenant, that is the Beacon Trust Company, at a rent of $4,500 a year, and then he says that the Beacon Trust Company being rejected, 'I claim of you that the rent should be credited with the sum of $6,500 per annum and that I should receive from you $500 a year, during the remainder of the term.' That is the excess amount of rent he is entitled to receive, — $500 a year, the excess rent. And in reply to that, under date of May 18, 1900, the President of the International Trust Company replies and says that the understanding of Mr. Weeks is correct, that the International Trust Company intends to hold him for the rent during the term of the lease, subject to what they may receive by subletting. Now, gentlemen, I instruct you as a matter of law that Mr. Weeks was not obliged to tender the International Trust Company the Beacon Trust Company as a tenant, unless the International Trust Company had elected to relet the property at the risk of the Broadway National Bank and had established a position in that respect in all the particulars to which I have called attention. And I instruct you also as a matter of law that unless the International Trust Company put itself in the position in which the rule required it to put itself before the correspondence took place, — unless it had elected within a reasonable time to sublet as the lease provided and had manifested its inten-

tion so to do in the way I pointed out to you and had done everything to put itself in the position as the owner of the property, as I described to you so that it was entitled to make the claim on Mr. Weeks, Mr. Weeks would not be entitled to this $500 per annum. He could claim it only in view of the fact that he understood that the International Trust Company had put itself in the position that he was bound; Mr. Weeks could not claim the $500 unless he was entitled to the deficiency. The proposition of law is too plain to need elaboration. Nevertheless, it does not follow absolutely that because Mr. Weeks understood at that time in a certain way, or because Mr. Weeks made the claim at that time it was consistent with the position now taken here, that the case is disposed of for the benefit of the plaintiff on that particular point. It only goes to show what the mutual understanding of the parties was and it is for you, I having explained it, to satisfy yourselves whether or not, from the matter to which I have called your attention, the parties then understood on both sides that the International Trust Company had established its position on that particular point, and if they so understood it, you will disturb it except in view of some clear explanation to the contrary."

Record, pp. 47, 48.

On the evidence and under the above instructions it is inconceivable that the jury could have based their verdict on the proposition that it was necessary for the plaintiff in error to notify the defendant in error of its election to hold the defendant in error for the balance of the rent, and that there had been no notification of such election.

"No judgment should be reversed in a court of error when it is clear that the error could not have prejudiced, and did not prejudice, the rights of the party against whom the ruling was made."

Lancaster v. *Collins*, 115 U.S. 222, 227, and cases cited.

See also —

West v. *Camden*, 135 U.S. 507.
Aerkfetz v. *Humphreys*, 145 U.S. 418.
Lazarus v. *Phelps*, 156 U.S. 202, 206.
United States v. *Gentry*, 119 Fed. Rep. 70 (Circuit Court of Appeals, 8th Circuit, 1902).

The second assignment of error, therefore, is not well taken.

III.

The Third Request was Properly Refused.

This request is based on that clause in the lease immediately following the re-entry clause, which provides, —

"And thereupon the lessors may, at their discretion, relet the premises, at the risk of the lessee, who shall remain for the residue of said term responsible for the rent herein reserved and shall be credited with such amounts only as shall be by the lessors actually realized."

Record, p. 10.

When this case was before the Circuit Court of Appeals for the first time, Mr. Justice LOWELL, delivering the opinion of the Court, said, in reference to this contention on the part of the Trust Company, —

"We cannot adopt the plaintiff's construction of the covenant. At common law, if a lessee broke a covenant of the lease, either the covenant to pay rent or some other, and if the lessor had the right to re-enter for breach of covenant, the lessor might take either of two courses: Either he might abstain from re-entry, in which case the lessee remained liable on his covenant to pay rent until the end of the term, or, on the other hand, he might re-enter and resume possession, in which case the lessee's liability to pay rent was at an end. If the lessor did not re-enter, he retained his right against the lessee, but risked losing rent for his property by reason of the lessee's insolvency. If he re-entered, he gained the right to seek a solvent tenant, but ran the risk of losing rent by reason of his inability to find one. A covenant like that here in question, not uncommon in Massachusetts, has for its object to give the lessor some of the advantages which result from both the courses before described. The lessor is permitted to seek a solvent tenant without letting go his hold upon the old one. The covenant does not compel the lessor to relet or to attempt to relet if he does not wish to do so. He need not avail himself of the covenant. He may still abstain from re-entry, and so hold the lessee liable for rent *eo nomine*. He may still re-enter, and thereafter may use the premises as he sees fit, or may leave them wholly unused. The lessee cannot complain of either action. By the first he is left in possession of the premises; by the second he is relieved from his liability, under the covenant, to pay rent. On the other hand, the lessor may avail himself of the covenant. He may re-enter

and may exercise his discretion to relet the premises at the risk of the lessee. The exercise of this discretion is manifested by a reletting or by an attempt to relet. If there is an actual reletting, the covenant becomes operative, and the original lessee is liable for the deficiency of rent, at any rate if the reletting is honestly and reasonably made. If an honest and reasonable attempt to relet is made without success, then also the lessee is liable; the lessor need not go through the form of a reletting. But if the lessor does not relet, and makes no attempt to relet, he has not exercised the discretion nor has he made the election given him by the covenant, and, as we hold, it is only upon the exercise of the lessor's discretion to relet that the covenant imposes a liability upon the lessee. The re-entry has terminated the lessor's right to recover rent *eo nomine*, and the right given by the covenant to recover the difference between the old rent and the new does not arise until the election to relet has been made by the lessor. The lease does not, indeed, impose upon the lessor any duty to relet or to attempt to relet. The lease merely gives the lessor certain rights upon his election to do certain acts.

"The injustice which would result from the plaintiff's construction of the lease makes it improbable that the parties intended such a construction. In argument, the plaintiff's counsel admitted that the lessee's liability under the covenant would cease if the premises were destroyed by fire or were actually used by the lessor. But to concede this is to abandon the plaintiff's whole contention. There is no material distinction between the actual use of premises by the

lessor, and his possession of the premises with an intent to prevent actual use by anybody else, and there is none between a general refusal to relet and an unreasonable refusal to relet to a suitable tenant. We go further, and hold that, in order to make the lessee liable under this covenant, the lessor must within a reasonable time make his election to relet, and must manifest that election by a reasonable attempt to do so. What sort of an attempt he must make we need not discuss here. In general, the effort must be that which a reasonable landowner would make under the circumstances. Not every proposed tenant need be accepted, but an unreasonable refusal to accept a suitable tenant will be deemed an abandonment of the election to relet at the risk of the lessee."

125 Fed. Rep. 375.

The learned judge of the Circuit Court, in overruling the plaintiff's motion for a new trial (see Record, p. 63), stated that the fair interpretation to be put upon the declaration of the Circuit Court of Appeals that the lessor must manifest his election by a reasonable attempt to relet, was that such election could only be manifested in that way. There were also other intimations in the opinion of the learned judge, in his charge to the jury, and in the argument of the plaintiff in error both in the Circuit Court and the Court of Appeals that the decision of the Circuit Court of Appeals was not altogether correct or consistent.

These reflections on the opinion of the Circuit Court of Appeals are without foundation. A fair interpretation of the language of the Circuit Court of Appeals shows that what the decision intended to establish was that in order to hold the lessee under the clause in question the lessor

must elect to relet at the risk of the lessee; that such an election would be manifested by a reletting within a reasonable time, or by an honest but unsuccessful attempt to relet within a reasonable time. The Court did not say, and did not intend to say, that an election to relet at the risk of the lessee could be shown in no other manner.

It is quite obvious that a lessor could elect to relet at the risk of the lessee by declarations, either oral or written, appropriate for the purpose, as, in fact, the plaintiff in error did in this case.

Record, p. 56.

But if, having made an election, either in this way or in any other way, the lessor afterwards neither relet nor made any attempt to relet, he would thereby, as the Circuit Court of Appeals held, abandon such election. Inasmuch as, on the undisputed evidence, the Trust Company elected to hold the defendant in error under the clause in question, and manifested that election by a letter to the defendant in error declaring such election, —

Record, p. 56, —

the verdict of the jury amounts to a finding that the Trust Company did not make a reasonable effort to relet, and thereby abandoned its election.

The decision and the opinion of the Circuit Court of Appeals was consistent and correct in every particular, but, in any event, whether it was or not, is not here of importance, inasmuch as the only question presented to this Court by the third assignment of error is whether or not it was obligatory upon the plaintiff to relet the premises or to attempt to relet them.

The defendant in error does not contend that it was

necessary for the plaintiff to relet the premises. If it made a reasonable attempt to do so, and failed, it could doubtless recover. But the jury has settled that it did not make a reasonable attempt to relet the premises, so that the only question which remains is whether, in any event, the lessee can recover by virtue of the clause under discussion without any attempt whatsoever to relet the premises.

The Circuit Court of Appeals rightly decided that there could be no recovery in the absence of such an attempt, the clause not warranting the construction sought to be placed upon it by the plaintiff in error.

The provision embodied in it seems not to have been used, at least in the exact form in which it appears in this lease, in any other jurisdiction than that of Massachusetts, but, as was pointed out by counsel, *arguendo*, in 1887, in the case of *Bowditch* v. *Raymond*, 146 Mass. 109, at page 111, it had then been found on the usual form of lease in Massachusetts for a generation. It is, of course, an attempt to impose on the lessee, after the termination of the lease, some kind of liability in the place of rent, and as such, however narrowly construed, is somewhat novel in its character. It is not surprising, therefore, that not long after its first appearance as a usual provision in Massachusetts leases, its legality was attacked, even where no question was raised as to whether the lessor had made reasonable efforts to relet the premises.

Way v. *Reed*, 6 Allen, 364.

The legality of the provision was sustained in that case, but as a matter of fact the lessor did relet after his re-entry, and for the purposes of the case it was not necessary, and no attempt seems to have been made, either by counsel or by Court, to attach to the provision in question any other

meaning than that in case of a re-entry by the lessor for breach of condition, and a reletting by him at the risk of the lessee, the latter should be liable for the difference between the rent reserved in the original lease and the rent received by the lessor as a result of the reletting; and it was the legality of the provision so limited in its construction that was attacked by the defendant and sustained by the Court.

It can scarcely be doubted that at some time in the many years during which the clause has been in use in Massachusetts leases occasion must have arisen for the contention on the part of lessors that it should have the construction sought to be placed upon it by the defendant in error. It is equally certain that, if such contention had been put forward, it would have been resisted by lessees and have given rise to litigation, since it required a decision of the Supreme Judicial Court of Massachusetts to establish the legality of a stipulation that the lessee should be liable for any deficiency only on a reletting.

Diligent search has failed to reveal that the broad construction contended for by the plaintiff in error has ever been advanced in a Massachusetts court.

It is more than probable, therefore, that in the profession generally, and among persons having to do with the leasing of real estate, the clause has always been regarded as imposing liability upon the lessee after the termination of the lease only in case the lessor relet at the lessee's risk, or made reasonable effort so to do.

Some light may be thrown upon the inquiry as to the true construction of the clause by adverting to the reason of its insertion in leases, which, in a general way, is fairly apparent.

If a lessee commits a breach of condition and the lessor

is authorized by the terms of the lease in case of such breach to re-enter, in the absence of a provision such as that under discussion, as was pointed out by the Circuit Court of Appeals, one of two courses is open to him: He may hold the lessee liable personally and maintain the lease, or he may terminate the lease and resume possession of the premises. The advantage of the former proceeding is that he retains what may be an advantageous lease and is not put to the hazard of seeking a new tenant; the disadvantage is that the lessor is forced to depend entirely upon the responsibility of the lessee. The advantage of a re-entry and a termination of the lease is that the lessor gets back his premises from one who has shown a disposition not to observe the terms of the lease; the disadvantage is that the landlord takes his chances of being able to get as good a tenant at as good a rental, or even any tenant at all. That the lessor should attempt to get the benefit of both courses, and should seek, having made a good lease, to get the benefit of it during its full term, is not at all unnatural, and, on the whole, neither unreasonable nor unfair, nor is such an attempt one which lessees ordinarily in making their contract would object to. A man taking a lease of premises in good faith expects to live up to his contract, and ought to be, and usually is, willing to have it stipulated that, if there is a breach of condition for which the lessor feels obliged to re-enter he should not thereby, through the default of the lessee, lose the benefit of the lease for the entire remainder of the term. In other words, it is not improper that the lessor should stipulate for such provisions as will insure to him, as far as possible, the benefit of a lease which he has made for its full term, and nothing more; but it is not reasonable nor fair, nor would lessees be likely to consent, that the

lessor should derive a positive advantage from the breach by the lessee of the conditions in the lease. If the lessor makes reasonable efforts to relet in case of a re-entry, and holds the lessee for any deficiency, he is in practically the same position as he would be if there had been no breach. If he is entitled under the clause in question intentionally to keep the premises vacant and collect the full rent from the lessee, he is considerably better off than he would have been if there had been no breach; in fact, it is difficult to say, according to the construction sought to be placed upon this clause by the defendant in error, why the lessee would not remain liable for the full rent even although the lessors should actually occupy the premises themselves, or although the lessees should be evicted by a paramount title, or although the premises should be destroyed by fire. Such a stipulation would scarcely be one that a person bargaining for a lease of premises would be willing to accept, and it seems incredible that it should have been accepted for so many years in so many leases. Doubtless, parties must be bound by their contracts, although improvident; but in a question of construction the Court will lean toward what is reasonable and likely, and will construe the lease most strongly against the lessor.

It is fair to assume, if parties are to be bound by their contracts, and if the true meaning of this clause is what the defendant in error asserts it to be, that parties making leases containing such a clause so understand it. For instance, it must be assumed that the lessor expects and the lessee concedes that if, by reason of a temporary financial embarrassment, the lessee is unable to pay the rent for the first month of the term, or one of the lessee's servants drives a few nails into the wall without the knowledge of the lessee,

the lessor may enter and hold the lessee liable for a sum equal to the rent for the remainder of the term, which may be perhaps fifty years, at a rent of $10,000 a year. So also it must be assumed that the parties contemplated the possibility of the lessor's occupying the premises himself, or their being destroyed by fire, and that the lessee was willing to become a party to a contract under which he would remain liable for the rent for the remainder of the term, even though the lessor occupied the premises and enjoyed the beneficial use thereof, or even though they were destroyed by fire; for, if the defendant in error is right in its contention, it is difficult to see how, under the language of the clause, any allowance could be made to the lessee in such circumstances. Certainly, a court should require language very clear and very explicit to induce it to place so drastic a construction upon a clause which, it is safe to say, is contained in leases of millions of dollars' worth of property in the city of Boston alone.

In the argument before the Circuit Court of Appeals counsel for the Trust Company admitted that the lessee's liability under the covenant would cease if the premises were destroyed by fire or were actually used by the lessor. "But," as said by that Court, "to concede this is to abandon the plaintiff's whole contention. There is no material distinction between the actual use of premises by the lessor, and his possession of premises with an intent to prevent actual use by anybody else, and there is none between a general refusal to relet and an unreasonable refusal to relet to a suitable tenant."

The language of the above-quoted clause is not apt for the construction sought to be placed upon it by plaintiff in error, but is apt for the construction contended for by the defendant in error. It immediately follows the re-entry

clause after a semicolon, and provides that "thereupon" (that is, when the lessor has re-entered and repossessed itself as of its former estate) "the lessors may at their discretion relet the premises at the risk of the lessee." So far, there is nothing in the language quoted to impose any liability on the lessee. Such liability cannot arise till the lessor has elected to avail himself of the privilege conferred on him. This he is not bound to do, and may never do. He may prefer to occupy the demised premises himself, or to tear down the buildings, or to deal with the property in other ways inconsistent with a reletting, or even with a reasonable attempt to relet, in the absence of which, in the language of the clause, the premises would not be at the risk of the lessee. Clearly there must be an election by the lessor whether he will relet at the risk of the lessee or not before the above language could bring the lessee under any responsibility. That election might be declared by a statement oral or written. But if it were followed by a failure to make any reasonable effort to relet or by an intentional keeping of the premises vacant the election must be held to have been abandoned. Or the election might be declared by a reletting or an honest attempt to relet, although, perhaps, as the lessor might, if he chose, waive his right to relet at the risk of the lessee, and let on his own account, there ought to be some accompanying declaration. In any event, the mere entry to terminate the lease is a colorless act, and no election, for thereafter the lessor might or might not choose to let at the risk of the lessee. In the case at bar the plaintiff in error declared its election in writing, but it afterwards, as the jury found, abandoned its election by failing to make any reasonable effort to relet.

After the above-cited passage the clause then proceeds,

"who shall remain for the residue of said term responsible for the rents herein reserved." The word "who" is not to be taken as referring to lessee in general as its antecedent, but to the lessee specified in the preceding phrase, that is, a lessee in a particular situation, a special kind of a lessee; in other words, a lessee at whose risk the premises have been relet, and no other kind of a lessee. A pronoun depending upon a specifically described antecedent cannot be referred to the antecedent stripped of its description. The balance of the clause is perfectly consistent with what precedes it as here construed, and is inserted to relieve the lessor from taking the responsibility of being able to secure a new tenant, and of taking the risk of his responsibility when secured. It is submitted that the clause authorizes the lessor to hold the lessee responsible for rent after the termination of the lease only in case the premises are relet, or in good faith attempted to be relet, at the risk of the lessee.

The words are susceptible of this construction easily and naturally. It is not necessary, in order to arrive at it, that anything should be left out or inserted, and the whole is calculated properly to express what is contended for by the defendant in error. On the other hand, if the extended construction sought to be put upon the clause by the plaintiff in error is the true one, the first portion of the clause is entirely superfluous; for, if the lessee is to remain liable for the residue of the term, whether the premises are relet or not, and whether the lessor makes any effort to relet them or not, the words "may at their discretion relet the premises at the risk of the lessee" are entirely superfluous. Of course, after the termination of the lease, the lessor would have the right to let his premises or not, as he chose, and, whether he did or not, it would be

equally at the risk of the lessee. It is as idle to stipulate that the lessor may relet at the risk of the lessee, when the latter is liable in any event, as it would be for a grantee in fee of real estate to stipulate in the deed that he might deal with the granted premises as he should see fit. In fact, what is obviously intended as a privilege to the lessor namely, to let at the risk of the lessee — would in this view be really a privilege to the lessee; for, if there were a reletting, the lessee would be entitled to a credit for rent received, even according to the construction of the defendant in error; whereas, if there were no reletting, the lessee would, according to the same construction, be liable for the full rent for the remainder of the term. In short, if the clause were made to read, "and thereupon the lessee shall remain for the residue of said term responsible for the rent herein reserved, and shall be credited with such amounts only as shall be by the lessors actually realized," it would have the same meaning as the plaintiff in error seeks to put on the clause as it stands.

The construction which gives each word its due proportion of weight, and to which every word in the clause is necessary, and which is fair, reasonable, and likely, and one which puts the lessor in practically the same position as if there had been no breach, is to be preferred over a construction which does not give every word its due weight and influence, but which renders a whole phrase superfluous, and which is not fair or reasonable, but would put the lessor in a better position than if there had been no breach. Nor is judicial authority wanting in support of the position of the defendant in error. In *Way* v. *Reed*, *ubi supra*, it appeared that there was a re-entry for breach of condition, and that the lessor incurred some expense for repairs, and actually relet the premises. The tenant ob-

jected that he could not be held liable for the rent of the premises after they were taken possession of by the lessor. The Court said, however, —

> "The answer to this objection is that such right to re-enter the premises and to relet the same at the risk of the lessees was expressly reserved by the lease, and that it appears by the paper signed by the assignee that the lessor entered under this clause. We can see no reason why this entry was not lawful."

The Court here says expressly that the right reserved to the lessor under this clause was a right to re-enter, and to relet at the risk of the lessees. Again:

> "After such entry lawfully made, the plaintiff, acting in good faith, had a right to incur expense for such repairs, and to relet the premises at the risk of the lessee; such is the express stipulation contained in the lease. The defendant is therefore liable for whatever balance may be due to the plaintiff for the residue of the term, after making all proper reductions for sums received for rent of the premises from persons to whom they were relet by him."

Here, again, the right conferred by the clause upon the lessor is said by the Court to be a right to relet the premises at the risk of the lessee, and to hold the defendant for any deficiency. Clearly, if the clause had imposed an absolute liability upon the lessee to pay rent for the remainder of the term, whether there was any reletting or not, it would have been worse than useless to dwell and insist upon that portion of the clause which gave the lessor the right to re-enter and relet at the risk of the lessee, for the lessor would, under such construction, as already indi-

cated, have the right to relet or not, as he chose, and hold the lessee in any event. The language of the Court makes it clear that in its opinion the right, privilege, and extra advantage which the clause conferred on the lessor was that of reletting at the risk of the lessee, and the inevitable conclusion is that, if there was no reletting or attempt to relet at the risk of the lessee, he was subjected to no liability.

In *Bowditch* v. *Raymond, ubi supra*, which contained a clause identical with the one in the present lease, the Court, in holding that the lessor, in case of the insolvency of the lessee, could not prove against his estate for an amount equal to the rent to grow due for the balance of the term of the lease under the clause in question, at page 115, said, —

> "At the first publication of notice there was a contingency, not merely as to the amount of liability, but as to whether it would ever attach or arise out of the covenant. The lessors in their discretion might not relet the premises, but resume possession of them. It may be that the lessees will be evicted by a paramount title, in which case it cannot be doubted that the liability of the original lessees would be terminated or fail to attach. It may happen that the new lessees will pay as large a sum as the rent and taxes reserved in the lease, in which event no liability would arise under the covenant, or the premises might be destroyed by fire, and thus the liability of the lessees be terminated. The existence of any debt in the future depends upon contingencies, and therefore the appellant's claim cannot be proved under our insolvent law prior to the statute of 1879."

In reference to this language it was said in the Court of Appeals (125 Fed. Rep. 377) that it implied "that resumption of possession without reletting prevents the obligation of the covenant from attaching to the lessee."

In other words, the claim cannot be proved because the very existence of any claim is dependent upon certain contingencies which are specified, and one of those contingencies is that the lessors in their discretion might not relet the premises, but might resume possession of them, in which case, as the Court puts it, there would be no liability. The above-quoted passage, it is submitted, is a specific declaration on the part of the Supreme Judicial Court of Massachusetts that no liability attaches to the lessee under this clause unless there is an election to relet at the risk of the lessee, followed by a reasonable attempt so to do.

See also *In re Ells*, 98 Fed. Rep. 967.

In *Woodbury* v. *Sparrell Print*, 187 Mass. 426, a lease was under consideration one of the provisions of which was, —

> "In case of such determination, . . . the lessee shall be liable to the lessor for all loss and damage sustained by the lessors on account of the premises remaining unleased, or being let for the remainder of the term for a less rent than that herein reserved."

Referring to this provision the Court said, at page 428:

> "This stipulation is an agreement, which is binding as a contract in the nature of a covenant, to pay the lessors the amount of their loss or damage on account of the premises remaining unleased after a determination of the lease for a breach of the covenants. It

also includes an agreement to pay for the loss, if any, on account of the premises being let at a less rent for the remainder of the term."

The Court also said, at page 431, —

"The lessor has the premises, and presumably uses them or lets them to another tenant. They are liable, however, to remain unleased and unused for a time, but ordinarily not for a very long time. The lessee agrees to pay for the loss that may come from this liability."

The Court found that the lessors, immediately after taking possession, made a reasonable effort to relet the premises.

The Court further held that under this clause in the lease there was no obligation upon the lessee to pay rent as rent, according to the covenants, for the term previously ended by the lessor's entry; nor even to pay sums equal to the rent in instalments, but that, on the contrary, the lessee was under no liability until the premises ceased to remain unleased.

In —

Edmands v. *Rust & Richardson*, 191 Mass. 123, —

a lease was under consideration which, after authorizing a re-entry in certain contingencies, provided that, "Upon entry as aforesaid the said term shall cease and be ended, but the lessees covenant to be responsible for any loss or diminution of rent sustained by the lessors in consequence till the end of the lease." The case was an action by the lessor against the lessee under the aforesaid covenant to recover for loss of rent. The Court overruled the defend-

ants' exception to the refusal of the trial court to instruct the jury that on all the evidence the plaintiff was not entitled to recover, on the ground that —

> "the evidence tended to show that the plaintiffs, upon regaining possession, managed the property in good faith, according to their best judgment, for the interest of the defendant as well as for their own, and that they did everything that it was their duty to do to prevent unnecessary loss or diminution of rent in consequence of the termination of the lease. The language of this covenant is quite different from that of the covenant referred to in *Weeks* v. *International Trust Co.* 125 Fed. Rep. 370, and *Bowditch* v. *Raymond*, 146 Mass. 109, and it is also different from the language in the lease before the Court in *Woodbury* v. *Sparrell Print*, 187 Mass. 426. It may well be that its requirements of the lessors are less strict in some particulars than those stated in the first of the above cases, but even if they are precisely the same, the first request for a ruling was rightly refused."

The Court also overruled the defendants' exceptions to the refusal of the trial court to give the defendants' seventeenth and eighteenth requests. These requests related to the duty of the lessors in relation to the premises after the termination of the lease, and among other things the Court was asked to instruct the jury that a tenant could not be declined by the lessors on the question of financial responsibility, if the tenant were satisfactory financially to the lessee. The Court held that this part of the requests was bad, and that as to the requests generally, the instruc-

tions to the jury on the points covered by the requests were sufficiently favorable to the defendant.

The trial court had instructed the jury as follows: —

> "After they" [the lessors] "had assumed the trusteeship of this property for the benefit of the Rust Richardson Drug Co. in April or July then they must act as a prudent landlord would act in regard to the management of his own property. It does not mean that they would be obliged to take every tenant that comes along, as it has been stated in the case which is brought here and which both parties have asked me to make a partial statement from. 'In general the effort must be that which a reasonable landowner would make under the circumstances. Not every proposed tenant need be accepted but an unreasonable refusal to accept a suitable tenant will be deemed an abandonment of the election to relet at the risk of the lessee.' So in viewing the conduct of these parties after they had assumed the control of that property and with the intention of letting it to the best advantage they could, and to hold the Rust Richardson Drug Co. for the difference between what they were able to get using that endeavor and what the lease called for, then they must act as a prudent landlord would act in regard to his own property."

The Court said, —

> "The contention of the defendant was stated fully, and the jury were left to decide between the parties, in a way of which the defendant has no reason to complain."

It is submitted that under the foregoing decisions of the Supreme Judicial Court of Massachusetts no liability rests or can rest upon the lessee under such a clause as the one presented in the case at bar, in the absence of a reasonable attempt to relet the premises after the termination of the lease.

It is well settled that, this being a matter of the construction of a lease of real estate, the decision of the Supreme Judicial Court of Massachusetts will be followed by this Court.

Jackson v. *Chew*, 12 Wheat. 153, 167.
Henderson v. *Griffin*, 5 Peters, 151, 155.
Beauregard v. *New Orleans*, 18 How. 497.
Suydam v. *Williamson*, 24 How. 427.
Burgess v. *Seligman*, 107 U.S. 20, 33.
Barber v. *Pittsburgh &c. Ry.*, 166 U.S. 83, 99.
Warburton v. *White*, 176 U.S. 484, 496.
Freeport Water Co. v. *Freeport City*, 180 U.S. 587, 595.

The plaintiff in error will call attention to that portion of the lease describing the demised premises which states that they are "to be used as the business offices of said corporation" [Broadway National Bank] "and for no other purpose." (Record, p. 8.) Also to the lessee's covenant that "the said leased premises, or any part thereof, shall not be occupied or used by the lessee, or those holding under it, for any other purpose or business than that for which the same are hereby leased, and which is expressed in this lease, without permission in writing first given by the lessors." (Record, p. 9.) Also to the lessee's covenant not to "assign this lease, nor underlet the whole

or any part of the said premises, without permission in writing being first given by the lessors." (Record, p. 9.)

The only possible significance of the above-quoted clauses as to the use and occupation of the premises, and assigning or underletting the same, must be in connection with the discretion to be exercised by the lessor in reletting at the risk of the lessee, or in connection with the construction to be placed upon the clause authorizing the lessor to relet at the risk of the lessee. So far as the first point is concerned, if it was the duty of the plaintiff in error to make reasonable efforts to relet, the verdict of the jury has settled that the Trust Company did not exercise a reasonable discretion.

So far as the second point is concerned, it is proper to say that the argument was pressed on the Circuit Court of Appeals without avail. Because the original lessors (not the plaintiff in this case) found it expedient to restrict the use which the lessee might make of the demised premises, and to forbid the lessee's assigning or subletting without their consent (which clause appears in almost every lease, whether also containing a provision authorizing the lessor to let at the risk of the lessee or not), it is not perceived how any light is thereby thrown upon the proper construction to be placed upon the clause in question.

It certainly does not follow that the plaintiff in error may refrain from all attempt to relet the premises and yet hold the defendant in error liable for the rent for the remainder of the term. The clauses as to use and occupation and assigning and subletting, were inserted into the lease to govern the relations of the parties during the continuance of the tenancy, and ceased to have any force after the termination of the lease. The clause as to relet-

ting at the risk of the lessee was inserted into the lease to govern the relations of the parties after its termination, and the restrictions imposed upon the lessee in regard to his use and occupation of the premises during the lease can have no tendency to show that he also entered into an agreement to be liable after the termination of the lease for the entire rent for the remainder of the term, although the lessor made no attempt whatsoever to relet the premises.

Especial reliance seems to be placed by the plaintiff in error on the word "discretion." As already indicated, its true purpose was to secure to the lessor the privilege of deciding whether he should relet at the risk of the lessee or not. That was the question which was left in the discretion of the lessor. Possibly, also, it may have been intended by the word to show that, if the lessor chose to relet at the risk of the lessee, he should not be bound to accept any tenant who came along, nor any form of lease that was offered. A reasonable discretion is meant.

It is argued that, according to the construction contended for by the defendant in error, if the lessor made the utmost efforts to relet the premises, and failed, there could be no recovery from the lessee, and that this would be a hardship on the lessor. There are at least three considerations which, it is submitted, effectually dispose of this suggestion:

(*a*) Every contract must be dealt with in the light of the circumstances and the situation under which it was made. The lease in question was made with reference to a leasable property. Albert R. Whittier, Jr., a real estate broker, called as a witness by the defendant, testified that the fair market value of the entire premises, both banking rooms and basements, was from $5600 to $5700, and that

in February, 1900, it would have taken six or seven months to have found a reasonable and proper tenant.

Leslie C. Wead, a real-estate broker, called as a witness by the defendant, testified that the fair market rental value of the banking premises in 1900 was from $4200 to $4500, and that it would have taken, in the year 1900, a reasonable man from one to two months to rent the premises for the rental mentioned.

Record, pp. 31, 36.

Horace S. Crowell, a witness called by the plaintiff, testified that a fair market value for the leased premises in the spring of 1900 was $6000, and that it would have taken three to six months with the exercise of reasonable efforts in the year 1900, to have obtained a suitable tenant for the premises at this rental.

Record, p. 29.

At any rate, the premises could have been let to a proper tenant for something.

(*b*) Even if the clause had the effect suggested, the resultant hardship on the plaintiff in error, as pointed out by the Circuit Court of Appeals, would certainly be no greater than the hardship on the defendant in error that would result from the construction contended for by the plaintiff in error.

125 Fed. Rep. 370.

(*c*) The construction contended for by the defendant in error does not involve the result suggested.

If a notification were given by the lessor to the lessee, after an entry, that the lessor proposed to relet at the risk

of the lessee and hold the lessee for any deficiency, a deficiency would include the total rent reserved in case there were no reletting, as well as the difference in case there were a reletting. As said by Mr. Justice LOWELL in the Circuit Court of Appeals (125 Fed. Rep. 376), "If an honest and reasonable attempt to relet is made without success, then also the lessee is liable; the lessor need not go through the form of reletting."

Thus in —

Hall v. *Gould*, 13 N.Y. 127, —

the lease reserved to the lessor the right to enter for breach of a certain condition, and relet for the benefit of the lessee.

The Court held that, although the only power reserved to the lessor was a right to relet for the benefit of the lessee, having done his best and failed to secure a tenant, the lessee was liable for the full rent.

See also —

Nathan v. *Gendron Iron Wheel Co.*, 18 Misc. Rep. 374 (City Court of N.Y. 1896).

Lewis v. *Stafford*, 24 Misc. Rep. 717 (Supreme Court, N.Y., appellate term, 1898).

The third assignment of error is, therefore, not well taken.

IV.

The 4th and 5th assignments of error are not open to the plaintiff in error in this case.

The 4th assignment of error is fully covered under section 3 of this brief, and in any event neither the 4th nor the 5th assignment of error is open to the plaintiff in error

here, for the reason that the record discloses that no exception whatsoever was taken by the plaintiff to the charge at the trial in the Circuit Court, and that no errors were assigned in the Circuit Court of Appeals upon the ground that the charge was in any particular erroneous.

United States v. *Breitling*, 20 How. 252.
Lindsay v. *Burgess*, 156 U.S. 208.
Newport News & Mississippi Valley Co. v. *Pace*, 158 U.S. 36.
Eddy v. *Lafayette*, 163 U.S. 456, 466.

V.

The 6th and 7th assignments of error are not well taken.

These assignments of error are purely formal, and cannot, by themselves, avail the plaintiff in error anything.

Florida Central & Peninsular R.R. Co. v. *Cutting et al.*, 68 Fed. Rep. 586.
Oswego Township v. *Travelers Ins. Co.*, 70 Fed. Rep. 225.
United States v. *Ferguson*, 78 Fed. Rep. 103.
Hart et al. v. *Bowen*, 86 Fed. Rep. 877.
Smith v. *Hopkins*, 120 Fed. Rep. 921.

VI.

No verdict or judgment could, under any circumstances, be rendered for the plaintiff in error in this case.

The above proposition is based on the following reasons, all of which were raised by the defendant by appro-

priate exceptions to the charge and to the Court's refusals to charge, and were argued before the Circuit Court of Appeals.

125 Fed. Rep. 370.

1. The Circuit Court had no jurisdiction in this suit.

2. The lease being for a period which extended beyond the time of the expiration of the charter of the Broadway Bank, the covenant on the part of the lessee contained therein, to pay rent after the termination of the lease, was *ultra vires* and void.

3. There can be no recovery on the declaration as it stands, as it is plainly one for rent, while the proof shows merely a breach of covenant and no rent due.

4. Even if the lessee, in case of a termination of the lease for a breach of condition on his part, is liable for rent for the remainder of the term, whether the lessor relet or make any effort to relet at the risk of the lessee, or not, still the plaintiff in error can properly be allowed to recover only the damage actually suffered by it.

5. The damage actually suffered by the plaintiff in error was the difference between the rent reserved in the lease and what it would have obtained if it had made reasonable efforts to relet, or, at the most, the difference between the rent reserved in the lease and the fair rental value of the premises, and the evidence in this case clearly shows that if the plaintiff in error had made reasonable efforts to relet there would have been no deficiency in the rent.

6. The suit was prematurely brought.

I.

The Circuit Court had no jurisdiction of this suit.

As this is not a case commenced by the United States or by direction of any officer thereof, the Circuit Court had no jurisdiction, unless the present suit may be regarded as one for winding up the affairs of the bank, or, being against the stockholders' agent, may be regarded as a suit arising under the laws of the United States.

> Act of March 3, 1887, c. 373, secs. 1, 4, as amended by Act of August 13, 1888, c. 867.

This was not a suit for winding up the affairs of the Broadway Bank. The following cases were held to present instances of such suits: —

> *Snohmish County* v. *Puget Sound Bank*, 81 Fed. Rep. 518.
> *Armstrong* v. *Trautman*, 36 Fed. Rep. 275.
> *Guarantee Company* v. *Hanway*, 104 Fed. Rep. 369.
> *Brown* v. *Smith*, 88 Fed. Rep. 565.
> *Stephens* v. *Bernays*, 44 Fed. Rep. 642.
> *Spechart* v. *German National Bank*, 85 Fed. Rep. 12.
> *George* v. *Wallace*, 135 Fed. Rep. 286.

Accurately speaking, a suit for winding up the affairs of a bank would be a proceeding against the bank, or one by the bank itself, to terminate its existence, and bring about the payment of its debts, and the distribution of its assets. It is not perceived how even a suit brought by a receiver to get in the assets is a suit for winding up the

affairs of the bank; but, however this may be, it is submitted that a suit against the receiver, *à fortiori* against the stockholders' agent, is not such a proceeding.

It is argued that the stockholders' agent is an officer of the United States, and that, therefore, a suit against him is a suit arising under the laws of the United States. The argument is clearly erroneous. Under section 2 of article 2 of the Constitution of the United States, no one is an officer of the United States who is not appointed by the President, the courts of law, or the head of a department.

> *Thompson* v. *Poole*, 70 Fed. Rep. 725, 727, and cases cited.

The stockholders' agent of a national bank is not appointed by the President, or by the courts of law, or by the head of a department. He is not, therefore, an officer of the United States, and the cases of —

> *McConville* v. *Gilmore*, 36 Fed. Rep. 277;
> *Guarantee Company* v. *Hanway*, 104 Fed. Rep. 369, —

must be held to have been erroneously decided. The cases holding that a suit by and against receivers of national banks are suits by and against officers of the United States, are not in point, because, such receivers being appointed with the approval of the Secretary of the Treasury, may, in some sense, be said to be appointed by a head of a department. The present suit, therefore, not being against an officer of the United States, does not arise under the laws of the United States so as to be within the jurisdiction of the Circuit Court under section 1 of the act of March 3, 1887.

2.

The lease being for a period which extended beyond the time of the expiration of the charter of the Broadway Bank, the covenant on the part of the lessee contained therein to pay rent after the termination of the lease was ultra vires and void.

The charter was issued on September 29, 1884, and under the provisions of the United States Revised Statutes, sec. 5136, was to expire October 3, 1904.

Record, p. 35.

The lease was executed on August 11, 1898, and was for a term of ten years from April 1, 1899, —

Record, p. 8, —

and would, in the ordinary course, therefore, extend five years beyond the corporate life of the bank. If the lease were terminated at any time prior to the expiration of the bank's charter, under the stipulation in the lease authorizing the lessor, in such a case, to relet at the risk of the lessee, the bank might become liable to pay rent for the remainder of the term of the lease without even the benefit of occupying the demised premises. Such a stipulation is clearly *ultra vires* and void.

McCormick v. *Market National Bank*, 165 U.S. 538.

California Bank v. *Kennedy*, 167 U.S. 362.

Pullman Car Co. v. *Central Transportation Co.*, 171 U.S. 138.

Sioux City, &c. R.R. Co. v. *Trust Company of N. A.*, 173 U.S. 99.

Concord First National Bank v. *Hawkins*, 174 U.S. 364.
De La Vergne Co. v. *German Savings Bank*, 175 U.S. 40.
Scott v. *Deweese*, 181 U.S. 202, 217.

Reliance is placed by the plaintiff in error upon —

Brown v. *Schleier*, 118 Fed. Rep. 981.
Detroit Citizens Railway Co. v. *Detroit*, 64 Fed. Rep. 628.
Detroit v. *Detroit Citizens Railway Co.*, 184 U.S. 368.
Union Pacific R.R. Co. v. *Chicago &c. R.R. Co.*, 163 U.S. 564.

These cases are authority for the proposition that a corporation with a limited period of existence may take and hold an assignable lease of real estate for a term extending beyond the period of the life of the corporation, just as it may take and hold real estate in fee. They are not authority for the proposition that the personal covenants of the lessee to pay rent or perform any other act after the expiration of the corporate charter are valid and enforceable covenants.

In —

Brown v. *Schleier*, at page 985, —

the Court said, —

> "The rule being that, in such a case as the one at bar, the personal covenant of the corporation to pay rent would not be enforceable against it after the expiration of its charter, . . . it is not apparent that any sufficient reasons exist, based on the length of the term, to render the lease invalid."

This language is precisely in point. The plaintiff in error is not seeking to hold the defendant in error upon the lease as a valid and existing lease, but is endeavoring to hold him liable on a personal covenant contained in the lease. Furthermore, the cases cited by the plaintiff in error rely on the assignability of the lease. In the present case, the lease was not assignable without the express written consent of the lessor or his assigns.

3.

There can be no recovery on the declaration as it stands, as it is plainly one for rent, while the proof shows merely a breach of covenant and no rent due.

Such right as the Trust Company had after its entry for anything beyond rent then in arrears or preceding breach of covenant, must arise out of the stipulation that the lessee shall be liable for the rent for the remainder of the term, or, since no rent would then be due, that the lessee should remain liable for a sum equal to the rent for the remainder of the term.

This is a mere covenant, for a breach of which the appropriate form of proceeding would be an action on the contract and not an action of debt for rent accrued, although under existing forms of pleadings both actions would be in contract.

Way v. *Reed*, 6 Allen, 364, 366, 367, 371.
Woodbury v. *Sparrell Print*, 187 Mass. 426, 428, 431.
Edmands v. *Rust & Richardson Drug Co.*, 191 Mass. 123, 125.
Grommes v. *St. Paul Trust Co.*, 147 Ill. 634.
Hall v. *Gould*, 13 N.Y. 127.

Hackett v. *Richards*, *ubi supra*.

Lewis v. *Stafford*, 24 Misc. Rep. 717. (Supreme Court of New York, appellate term, 1898.)

Baldwin v. *Thibadeau*, 28 Alb. (N.C.) 14.

Taylor, Land. and Ten. (8th ed.) vol. p. 339, sec. 291.

In re Ells, 98 Fed. Rep. 967 (D. Ct. Mass. 1900).

In re Colligan, 4 Am. B. R. 250 (D. D. N. D. N.Y. 1900).

The declaration concludes "the plaintiff alleges that the defendant is indebted to the plaintiff in the sum of sixty-five hundred dollars for the several amounts of rent hereinbefore stated." This is clearly an action for rent, and what would have been, under the old forms of pleadings, an action of debt for rent accrued; whereas, the plaintiff's case shows an action for the breach of a covenant to pay after the expiration of the lease several sums of money equal to the rent for the remainder of the term.

4.

Even if the lessee, in case of a termination of the lease for a breach of condition on his part, is liable for rent for the remainder of the term whether the lessor relets or makes any effort to relet at the risk of the lessee or not, the defendant in error can properly be allowed to recover only for the damage actually suffered by it.

The lease constitutes a contract between the lessor and the lessee; the lessor, on the one side, agrees that the lessee

shall have the use of the demised premises for a specific time; the lessee, on the other side, agrees to pay therefor a certain amount of rent, and also, as a part of the consideration, enters into certain covenants. The contract then provides that in case the lessee does not observe his covenants the lessor may put an end to the contract, terminate the lease, and the lessee shall then become liable to pay a certain amount of money. It is clear that the clause imposing this liability on the lessee is one imposing a pecuniary fine upon him for the breaking of his contract, and the stipulation is in the nature of a penalty or forfeiture. It follows that the plaintiff in error should be limited in his recovery to the damage actually suffered by him, that is, to the loss of rent which the defendant in error would have suffered if it had used reasonable efforts to relet the premises.

It will, of course, be contended that the clause in question is merely one for liquidating the damages and not in the nature of a forfeiture or penalty, and that the parties are concluded by the sum agreed upon. This is not the true construction. The lease in question contained a large number of covenants on the part of the lessee not necessary to enumerate here. The clause making the lessee liable in case of a re-entry for rent for the remainder of the term has no reference to any of these covenants. Obviously, if the lessee, without the consent of the lessor, were to drill holes in the stone or brickwork in the first year of the term, and the lessor entered in consequence thereof, as he had the right to do as for a breach of the covenant that no alterations or additions should be made without the lessor's consent, the liability of the lessee under the clause in question could not be regarded as a stipulation for liquidating the damages suffered by the lessor for such breach of

covenant; nor if the lessee deliberately ruined the building on the leased premises in the last month of the term would the damages for the breach thereby committed of the covenants not to suffer any strip or waste of the premises be measured by the rent that should become due for the balance of the term.

The covenant to pay rent upon the termination of the lease comes to an end, and there is no further liability under it except to pay rent already accrued. It will not be seriously contended that, if the lessor entered for the non-payment of the first instalment of rent due under the lease, the clause in question fixes the damage for the failure to pay one month's rent.

Clearly the lessor, after re-entry, in addition to any rights he may have under this clause, has also a right of action for the breach of any covenant prior to the re-entry. In fact, it is provided in the lease that the entry should be "without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant."

What the clause was intended to guard against was the loss of the lease. If the lessor is compelled to repossess himself of the demised property by reason of a breach of covenant on the part of the lessee, he does thereby lose his rent for the remainder of the term, and it is the lessee's failure to pay rent after the termination of the lease for which this liability is imposed. The damage to the lessor at the outside could never have been more than the rent to become due for the balance of the term. It would almost inevitably be greatly less, for it is idle to say that the premises in question could not be leased for something at any time, which fact was of course perfectly apparent to all parties at the date of the execution of the lease. We

have, then, the typical case of an agreement to pay money as the main agreement, and the liability to pay a greater sum imposed for a breach of the main agreement. On all the authorities, this is in the nature of a penalty, and the lessor will be confined to his actual damage, and will not be allowed to recover the full amount of the penalty.

In —

Wallis v. *Smith*, 21 Ch. Div. 243, —

JESSEL, master of the rolls, classified the decisions and dicta on this subject, and his classification was approved in —

Sun Printing & Publishing Assn. v. *Moore*, 183 U.S. 642.

The first class of cases specified by the master of the rolls is as follows: —

> "Where a sum of money is stated to be payable either by way of liquidated damages or by way of penalty for breach of stipulations, some of which are, or one of which is, for the payment of a sum of money of less amount, that is really a penalty, and you can only recover the actual damage and the court will not sever the stipulation."

The clause in question, under the foregoing rule, is plainly a penalty, as nothing is said as to liquidated damages, and it had reference only to a single stipulation for the payment of money and not to any other stipulation.

See also —

Sedgwick on Damages (7th ed.), p. 259.
Tayloe v. *Sandiford*, 7 Wheat. 13.
Ranger v. *Great Western Railway Co.*, 5 H.L. Cases, 72, 94.
Kemble v. *Farren*, 6 Bing. 141.

Even if the stipulation be regarded as covering all the covenants in the lease, it should still be regarded as a penalty. The situation then presented would be that of a person who has entered into a variety of covenants, one of which, at least, is for the payment of a definite sum of money, and has agreed in case of a breach upon his part of any one or more of all the said covenants to pay a stipulated sum. Such an agreement is, on all the authorities, regarded as a penalty rather than as an agreement for liquidated damages.

Wallis v. *Smith*, *ubi supra*.
Price v. *Green*, 16 M. & W. 346.
Sun Printing & Publishing Assn. v. *Moore*, *ubi supra*.
Ex parte Clapper, 4 Ch. Div. 724.
Wilhelm v. *Eaves*, 27 Pacific, 1053.
Fisk v. *Gray*, 11 Allen, 132.

The situation very closely resembles that presented in the case of —

Gay Manufacturing Co. v. *Camp*, 65 Fed. Rep. 794, —

where an agreement to pay $5000 as liquidated damages in case of the termination of a lease for the default of a lessee was held to be a stipulation in the nature of a penalty. The decision was based on a reason which was disapproved in —

Sun Printing & Publishing Assn. v. *Moore*, —

but the decision was not disapproved.

The plaintiff in error, therefore, should be confined to the recovery of his actual damage, which, in this case, is

the difference between the rent for the remainder of the term and what the plaintiff in error would have received if it had made reasonable efforts to relet the premises.

5.

The damage actually suffered by the plaintiff in error was the difference between the rent reserved in the lease and what it would have obtained if it had made reasonable efforts to relet, or, at the most, the difference between the rent reserved in the lease and the fair rental value of the premises, and the evidence in this case clearly shows that if the plaintiff in error had made reasonable efforts to relet there would have been no deficiency in the rent.

The action, as has been seen, being one for the recovery of damages for a breach of contract, on familiar principles the lessor was bound to take all prudent measures reasonably within his power to mitigate his loss.

Sutherland on Damages (2d ed.) secs. 88–90.
Sedgwick on Damages (8th ed.) c. VI.
Carver, Carriage by Sea (3d ed.) sec. 719.
Warren v. *Stoddart*, 105 U.S. 224.
Marsh v. *McPherson*, 105 U.S. 709.
Cunningham Iron Co. v. *Warren Mfg. Co.*, 80 Fed. Rep. 878 (Cir. Ct. Dist. R.I. 1897).
Loker v. *Damon*, 17 Pick. 284.
French v. *Vining*, 102 Mass. 132.
Bates v. *Ray*, 102 Mass. 458.
Buell v. *County of Worcester*, 119 Mass. 372, 375.
Mears v. *Dole*, 135 Mass. 508.

Dodd v. *Jones*, 137 Mass. 322.
Cavanaugh v. *Durgin*, 156 Mass. 466.
Dobbins v. *Duquid*, 65 Ill. 464.
Beymer v. *McBride*, 37 Iowa, 114.
Bisher v. *Richards*, 9 Ohio St. 495.
Grau v. *McVicker*, 8 Biss. 13.
Bailey v. *Damon*, 3 Gray, 92.
The Bronx, 86 Fed. Rep. 808 (aff. C.C.A.).

This duty on the part of a person claiming damages includes the duty of accepting offers of proper parties of a substitute performance.

Costigan v. *Mohawk & Hudson R.R. Co.*, 2 Denio, 609.
Dobbins v. *Duquid*, 65 Ill. 464.
Beymer v. *McBride*, 37 Iowa, 114.
Bisher v. *Richards*, 9 Ohio St. 495.

In —

Fitch v. *Armour*, 14 N.Y. Supp. 319 (Superior Court, New York City, 1891), —

a lessor entered, resumed possession, and relet under a clause in the lease which provided that in case of a default on the part of the tenant the landlord might resume possession of the premises and relet the same for the remainder of the term, the tenant making good any deficiency. The new tenant having failed to pay, it was held that if the rent was not collected on account of any negligence of the lessor the lessee was to be credited with it.

The Court said, —

> "The plaintiff was acting on account of the defendant and was bound to use due diligence in renting and collecting rents."

It appeared that the lessor had refused to let to an actress, on the sole ground that her hours might be late, and thus the occupants of the other flats in the building be disturbed. The Court said, in reference to this,—

> "As, upon the plaintiff's testimony, this was the only reason, she was to be deemed in all other respects a fit and responsible tenant, whose offer it was the duty of the plaintiff to the defendant, to accept."

The Court further held that the plaintiff did not have the same right to discriminate as to what tenant he would accept in the defendant's place that he would have if the reletting were not on defendant's account, inasmuch as if the plaintiff were acting for himself he could rightfully discriminate without reason. The Court said,—

> "If he acted on account of defendant, he could rightfully discriminate only for sufficient reason."

It was also held that a request by the plaintiff, that the jury be instructed that if the plaintiff was of the opinion that to rent the premises to an actress would lower their character or standard, or would be objected to by the other tenants, he was justified in declining to accept her as a tenant, was rightfully refused, the Court saying,—

> "A mere opinion unsupported by any reason for the opinion would not be a sufficient ground for rejection, as he was acting for defendant as well as for himself. This was especially true when no inquiry which might be made of the tenants was made of them."

This case was argued before and decided by Chief Justice SEDGWICK and Justices FRIEDMAN and MCADAM, the

latter of whom is the author of the well-known work on Landlord and Tenant, and is especially significant in view of the provision in that portion of the lease in the present case describing the demised premises which states that they are "to be used as the business offices of said corporation and for no other purpose," and also in view of the lessee's covenant "that the said leased premises or any part thereof shall never be occupied or used by the lessee, or those holding under it, for any other purpose or business than that for which the same are hereby leased, and which is expressed in this lease, without permission in writing first given by the lessor," and in view of the lessee's covenant not to assign or underlet without the lessor's consent.

It will doubtless be attempted by the defendant in error to show that the effect of these provisions of the lease is to limit, if not entirely to destroy, the operation in this case of the principle of the law of damages above adverted to. Clearly, the above-quoted provisions cannot have any such effect. As has been seen, by the re-entry the lease was terminated, together with all the covenants and stipulations contained therein, except the clause in question. There was, therefore, no contract in force between the parties that the premises should be occupied for one purpose rather than another, and for the same reason there could be no question of assignment or subletting without the consent of the lessor. The defendant in error's right against the plaintiff in error being limited to actual damage, the former cannot escape the principle of reducing damage because an extinct lease contained provisions as to the use to be made of the premises and as to assigning and subletting. As well might reliance be placed on the terms of another lease than the one in question. With equal propriety might it be claimed that in a lease containing clauses simi-

lar to those relied on by the defendant in error, and also a provision as to reletting like that in *Fitch* v. *Armour*, the lessor would be entitled to notify the lessee that the premises would be relet at his risk and then refuse to accept any tenant on account of said other clauses, and hold the lessee for the rent for the entire balance of the term.

The plaintiff in error is entitled to a considerable discretion, doubtless, as to the terms of any reletting. Perhaps he would be entitled to require the reletting to be on substantially the same terms as to everything but amount of rent, length of term, and the portion of the premises leased. There would be also, no doubt, some discretion as to the new tenant. But the discretion in both particulars must be limited, as indicated in *Fitch* v. *Armour*. Such discretion cannot be exercised unreasonably or improperly.

Applying the foregoing principles, it is perfectly clear that the plaintiff in error did not take all prudent measures reasonably within its power to mitigate its loss, and did not make reasonable efforts to relet the premises, but, on the contrary, for its own purposes, intentionally kept them vacant.

The Beacon Trust Company was offered to the plaintiff in error as a tenant in April, 1900, before the defendant in error had vacated the premises, and again in September, 1900.

Record, pp. 22, 25, 31, 32, 35, 36, 37.

The Massachusetts Title Insurance Company was offered to the plaintiff in error as a tenant as early as June or September, 1900, and again in November.

Record, pp. 22, 31, 33, 34, 35, 36, 37, 38.

The offer of the Beacon Trust Company was made, in the first instance, to brokers, and was conditional upon the Beacon Trust Company being able to dispose of the lease of the premises then occupied by them.

Record, p. 59.

But the offer to the plaintiff in error of the Beacon Trust Company as a tenant was made free of any such condition, as the defendant in error was willing to assume the responsibility for the rent of the Beacon Trust Company under its old lease.

Record, pp. 31, 35, 36, 37.

The last offer of the Massachusetts Title Insurance Company was made to the brokers on condition that tenants were found for the company's own lease.

Record, pp. 33, 34.

This condition, however, was of no importance, as tenants for the lease were found.

Record, p. 34.

The plaintiff in error refused the Beacon Trust Company as a tenant because it was a competing company. The Massachusetts Title Insurance Company was refused as not being financially solvent.

Record, p. 22.

In view of the relative sizes of the International Trust Company and the Beacon Trust Company, —

Record, pp. 22, 23, 24, —

and in view of the testimony of practically all the wit-

nesses, except the president of the International Trust Company, to the effect that it was no disadvantage, rather to the contrary, to have another Trust Company located in the immediate vicinity, the objection of the plaintiff in error to the Beacon Trust Company as a tenant must be regarded as frivolous.

As regards the Massachusetts Title Insurance Company, in view of the statement of its financial condition which was submitted to the president of the International Trust Company, —

Record, p. 57, —

and in view of the history of the Massachusetts Title Insurance Company, especially in relation to the premises occupied by it and to its promptitude in paying its rent, —

Record, pp. 25, 33, 34, 35, —

the objections of the plaintiff in error to the Massachusetts Title Insurance Company as a tenant must be regarded as equally frivolous.

The jury unquestionably based its verdict on the refusal of the plaintiff in error to accept either one of those two companies as a tenant. Obviously, but for such refusal, the plaintiff in error would have suffered no actual damage whatever.

6.

The suit was prematurely brought.

The obligation of the lessee was to pay the difference between the rent reserved in the lease and what was received on a reletting. This could not probably be determined until the expiration of the lease. It certainly could

not be determined at any earlier period unless the premises were relet.

No obligation, therefore, rested on the lessee to pay anything until one or other of these events occurred.

Woodbury v. *Sparrell Print*, 187 Mass. 426.

When this suit was brought the premises had not been relet nor had the original term of the lease expired.

VII.

Inasmuch as the plaintiff in error could not recover in any event, even although the instructions, or either of them, requested by it should have been given, this Court should not order a new trial, but should affirm the judgment of the Circuit Court of Appeals.

"It would be idle to reverse the judgment and send the case back for a new trial if it be certain that the plaintiff cannot recover in the action."

Brobst v. *Brock*, 10 Wall. 519.
Campbell v. *Pratt*, 2 Peters, 354.
Greenleaf v. *Birth*, 5 Peters, 132.

In —

Chicago, Milwaukee & St. Paul Railway Co. v. *Ross*, 112 U.S. 377,—

Mr. Justice FIELD, delivering the opinion of the Court, at page 396, said,—

"We will not reverse the judgment below if an error was committed on the trial which could not have affected the verdict."

In —

Sullivan v. *Iron & Silver Mining Co.*, 143 U.S. 431, —

Mr. Justice BREWER, delivering the opinion of the Court, said, on page 434, —

> "Notwithstanding the technical error in this ruling, we cannot see that it wrought any prejudice to the substantial rights of the plaintiff in error, for, upon all the facts in the case, the judgment was one which must necessarily have been rendered."

In —

W. B. Grimes Dry Goods Co. v. *Malcolm*, 58 Fed. Rep. 670, —

CALDWELL, J., in delivering the opinion of the Circuit Court of Appeals for the eighth circuit, at page 672, said, —

> "Inasmuch as, upon the pleadings and evidence, the jury could rightfully find only as they did, it is unnecessary to consider exceptions based on instructions given and refused."

The decision in this case was affirmed in 164 U.S. 483.

See also —

Wisner v. *Brown*, 122 U.S. 214.

Henderson Bridge Co. v. *McGrath*, 134 U.S. 260.

West v. *Campden*, 135 U.S. 507, 521, and cases cited.

Aerkfetz v. *Humphreys*, 145 U.S. 418.

Lazarus v. *Phelps*, 156 U.S. 202, 206.

Peck v. *Heurich*, 167 U.S. 624.
Tubman v. *Baltimore & Ohio R.R. Co.*, 190 U.S. 38.

The decision of the Circuit Court of Appeals, therefore, should be affirmed.

EDWARD E. BLODGETT,
G. PHILIP WARDNER,
Counsel for Defendant in Error.

Supreme Court of the United States.

No. 31.—October Term, 1906.

International Trust Company, Plaintiff in Error, vs. John W. Weeks, Agent of the Shareholders of the Broadway National Bank.	In error to the United States Circuit Court of Appeals for the First Circuit.

[December 3, 1906.]

Mr. Justice McKenna delivered the opinion of the Court.

This is an action on contract brought in the Circuit Court of the United States for the District of Massachusetts, for rent alleged to be due under the terms of a lease made by Henry Parkman and others to the Broadway National Bank.

The original lessors sold the land and building leased to the International Trust Company, plaintiff in error. Defendant in error is agent of the shareholders of the Broadway National Bank.

The premises leased were the first floor of the building and the basement under the same, "to be used as the business offices of said corporation and for no other purpose." The lease contained a provision for re-entry upon breach of any covenant. "And thereupon the lessors may, at their discretion, relet the premises, at the risk of the lessee, who shall remain for the residue of said term responsible for the rent herein reserved, and shall be credited with such amounts only as shall be by the lessors actually realized."

On December 16, 1899, the bank became insolvent, and the Comptroller of the Currency appointed a receiver. On February 15, 1900, the Comptroller released the estate of the bank to defendant in error as the stockholders' agent. Between December 16, 1899, and January 5, 1900, the Trust Company entered upon the premises and repossessed itself of the same as of its former estate. The receiver occupied the premises for a while, but it was stipulated that such occupation was not to affect the rights of the parties. Defendant in error occupied the premises until May 19, 1900. He contended in defense of the action that upon the termination of the lease it was the duty of the Trust Company to use all reasonable effort to relet the premises, so as to minimize the damages, and that the company had not done so. And further, that suitable and responsible parties were willing at various times to hire the premises at a rent as great or greater than the rent reserved in the lease.

At the first trial of the case the Circuit Court took the opposite of defendant in error's contention, and held that by force of the lease the Trust Company did not assume any risk, and was only required to use its discretion "with some degree of reasonableness and with some degree of justice, and have some regard to the rights of the position of the other parties concerned." The court further held that the evidence did not show that the company had abused its discretion, and directed a verdict for it less certain payments made by the occupant of the basement, formerly the bank's tenant. This was reversed by the Circuit Court of Appeals. (125 Fed. Rep. 371.) The latter court held that a lessor had the right to re-enter and might exercise his discretion to relet the premises at the risk of the lessee. The lessor, it was said, need not go through the form of reletting, but an honest and reasonable attempt to relet should be made, and whether so made was a question for the jury.

Upon the second trial of the case in the Circuit Court the Trust Company expressed its contentions in requests for instructions to the jury as follows: (1) That it was entitled to rent the premises and relet them at the risk of the bank; (2) that there was no obligation upon it to notify the bank of its election so to do, or to relet the premises or attempt to relet them. The court declined to give the instructions, but instructed the jury in accordance with the principle expressed by the Circuit Court of Appeals. The jury returned a verdict for defendant in error, upon which judgment was duly entered. It was affirmed by the Circuit Court of Appeals.

(1) It is objected by defendant in error that the Circuit Court had no jurisdiction of this action. We think otherwise. The action is clearly one to wind up the affairs of the bank. (*In re Chetwood*, 165 U. S. 443, 459; *Guarantee Co.* v. *Hanway*, 104 Fed. Rep. 369.)

(2) The fact that the Trust Company did not make a reasonable effort to relet the premises was settled by the verdict of the jury against it, and the case is reduced to the simple question whether the company can recover by virtue of the provisions of the lease without any attempt whatsoever to relet the premises.

It is said in argument that the provision in controversy has been found in the usual form of lease in Massachusetts for a generation, and yet its meaning, as now brought in dispute, has not come up for or received explicit decision. To this absence of contention and decision both parties refer with equal confidence to establish that their respective constructions have been so indisputable as never to have been questioned. However, there are some indications of a judgment between the two constructions in the case of *Edmunds* v. *Rust & Richardson Drug Co.*, (191 Mass. 123,) which may be turned to in passing on a question so essentially local.

The lease passed on contained a provision for an entry by the lessors to terminate the lease for the breach of covenants, followed by this language: "But the lessee covenants to be responsible for any loss or diminution of rent sustained by lessors in consequence till the end of the lease." The defendant in the case requested instructions, expressing it to be the duty of the lessor to accept any tenant that was satisfactory financially to defendant. His instructions were refused, and the court instructed the jury, among other things, as follows: "In general, the effort must be that which a reasonable landholder would make under the circumstances. Not every proposed tenant need be accepted, but an unreasonable refusal to accept a suitable tenant will be deemed an abandonment of the election to relet at the risk of the lessee." Commenting on the instructions the Supreme Judicial Court said: "That the jury were left to decide between the parties, in a way of which the defendant has no reason to complain."

It is manifest from this decision that the lessor, after entry, has not the absolute discretion to relet or not to relet the premises, but that it is his duty to "prevent unnecessary loss or diminution of rent in consequence of the termination of the lease."

In *Browditch* v. *Raymond*, (146 Mass. 109,) the liability of the lessor, under the provision of a lease such as that in controversy, was denied against an insolvent lessee on the ground that it was dependent upon a contingency, not merely as to the amount of liability, but as to whether it would ever attach or arise out of the covenant. "The lessors," the court said, "in their discretion might not relet the premises, but resume possession of them." This case rests on the principle expressed by Judge Lowell, speaking for the Circuit Court of Appeals, that if the lessor avail himself of the covenant and re-enter he may exercise his discretion to relet the premises at risk of the lessee or occupy them. If he elect to relet he must make "an honest and reasonable attempt to relet." And this is a reasonable and just exaction. It is the spirit as well as the letter of the covenant, fulfilling its security without unnecessary loss to the lessee.

Whether the bank could have made a lease to extend beyond its charter life we need not decide.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.